

stereotypes³¹ and modes of manifesting intersectional discrimination affected Manuela but focuses on one specific stereotype that exacerbated the treatment to which she was subjected.

The stereotype of the “baby-killer” mother that has been promoted by certain actors in El Salvador was an important driver of the abortion ban and is linked to a larger context of the demonization of abortion as a political tool.³² Additional pressures, such as those on medical professionals to report, and on prosecutors to bring cases, find an easy target in women who often lack social and power and are already demonized by society.³³

This stereotype exacerbated Manuela’s abuse at every step in the process, as illustrated by this broader account:

[W]hen women are thought to be ‘baby-killers’, Salvadoran state officials are willing to ‘manufacture’ guilt even when no evidence of guilt exists, and to extend initial charges of abortion to the more highly penalized charge of homicide. Importantly, it is only a certain kind of woman who is targeted by the hyper-application of the abortion ban: poor, poorly educated, exposed to violence, reliant on public health care, and isolated from networks of social support.³⁴

This analysis fits the facts of this case. From the manufactured confession Manuela’s illiterate father was forced to sign with his thumb print³⁵ to the doctor’s opposing observations about the umbilical cord,³⁶ State officials, both medical and legal, acted in a way that presumed her guilt and manufactured evidence to corroborate their suspicions.

Manuela’s specific vulnerabilities clashed catastrophically with the practices outlined above, and the harms and violations that she suffered as a result were immense. Understanding how stereotyping exacerbated her treatment helps us understand the abuse not as a random occurrence

³¹ “Deeply rooted patriarchal attitudes and the pervasiveness of a machista culture that reinforces stereotypes about the roles and responsibilities of women and men in the family, the workplace and society constitute serious obstacles to women’s rights, in particular their right to be free from all forms of violence.” Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo - Addendum - Follow-up mission to El Salvador, para. 11, UN Doc. A/ HRC/17/26/Add.2 (2011).

³² Jocelyn Viterna, Jose Santos Guardado Bautista, Silvia Ivette Juarez Barrios, & Alba Evelyn Cortez, *Governance and the reversal of women’s rights: The case of abortion in El Salvador* (UNU-WIDER Working Paper No. 187 Series, 2017), 6.

³³ The structural factors that drive this behavior are explored here: “Given the institutional pressure put on these state officers to process cases and to meet monthly quotas, it is perhaps not surprising that women like those described below are processed much more quickly than are others awaiting trial. The women themselves are already vilified in the media as baby-killers; they have no economic or criminal power, and so cannot threaten the prosecutor, much less carry out such threats; they are obliged to use state-provided defence attorneys, who do little to prepare for their cases; and the ‘evidence’ against these women—the body of the dead infant—is typically easy to find as ‘proof’ of their guilt, in contrast to the many people who are ‘disappeared’ by gang violence. For these reasons, prosecutors likely find the cases of marginalized women highly attractive from a prosecutorial standpoint. The conditions of the country may therefore intersect powerfully with the political campaign against abortion to incentivize Salvadoran state institutions to prosecute—quickly and harshly—impoverished women.” *Id.* at 9.

³⁴ *Id.* at 14.

³⁵ IACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, Para 52.

³⁶ IACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, Para 50.

but as part of a systemic pattern. All those who are similarly situated are at risk of suffering the exact same harms.

THE COURT SHOULD DECRIMINALIZE ABORTION

In light of its consideration of the confluence of vulnerabilities faced by all young women from the lower socio-economic groups in El Salvador, the Court will need to explore the remedies that will best honor Manuela and protect all similarly-situated women. Applying a “differentiated approach”³⁷ to this process and taking account of the views expressed by a wide range of human rights bodies at the international level should lead the court to conclude that there are no piecemeal safeguards short of decriminalizing abortion that will adequately resolve the problem caused by the relevant legislation.³⁸

In its Report, the Commission outlined three recommendations to the Salvadoran State. The first is to provide reparations for all the violations that they found the state had violated to Manuela’s detriment. The second is to conduct investigations into all administrative, disciplinary, or other responsibilities found in the report. The third is to “implement the mechanisms necessary to prevent repetition of the violations declared in this report.” It proceeded to indicate how that should be done.³⁹ The recommendations include improving public defense, bolstering legal protections, and creating education campaigns aimed at removing lack of education about reproductive rights from one of the vulnerabilities an individual might face.

³⁷ Inter-American Court. *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, para. 289.

³⁸ For further legal support of the decriminalization of abortion, see U.N. Committee on Economic, Social and Cultural Rights, *General comment No. 22 on the right to sexual and reproductive health*, 2016, pars. 28, 34, 40, 57; Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 2016, par. 60; U.N. INTERIM REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH, 2011, pars. 21 and 65, h); JOINT STATEMENT BY CEDAW AND CRPD COMMITTEES, *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities*, (2018); U.N. SAFE ABORTIONS FOR ALL WOMEN WHO NEED THEM - NOT JUST THE RICH (2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22167&LangID=E>.

³⁹ “In particular: (i) strengthen the full effectiveness of public defense, particularly in cases involving the possible imposition of severe punishments, including disciplinary measures for accountability regarding actions or omissions that constitute manifest negligence; (ii) ensure that according to regulation and in practice, individuals convicted of a crime can appeal to a higher authority that can comprehensively review the judgment to convict; (iii) ensure that the concept of *in flagrante delicto* is applied pursuant to the standards described in this report; (iv) ensure that in both law and in practice, the use of pretrial detention adheres to the standards described in this report; (v) conduct proper training of public defenders, prosecutors, judges, and other judicial officials aimed at eliminating the use of discriminatory stereotypes on the role of women, taking into account their negative impact on criminal investigations and assessment of evidence, as well as on criminal responsibility in judicial decisions; (vi) review and adjust discriminatory institutional practices within criminal law and the healthcare sector, pursuant to the terms analyzed in this report; (vii) established mechanisms to inform women at the local level, specifically those in situations of poverty, on their rights regarding sexual and reproductive health; and (viii) ensure the legal certainty of professional medical confidentiality through adequate regulations that are the result of properly weighing the rights and interests in question, and establish a protocol for their protection governing medical personnel in cases involving obstetric emergencies or abortions that meets international standards and provides a detailed review of grounds for exception.” IACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, recommendation 3.

While some recommendations may reduce the risk of future violations, others are incompatible with the extant law governing the abortion ban and its prosecution. For example, recommendation (vii) is to “ensure the legal certainty of professional medical confidentiality through adequate regulations that are the result of properly weighing the rights and interests in question and establish a protocol for their protection governing medical personnel in cases involving obstetric emergencies or abortions that meets international standards and provides a detailed review of grounds for exception.” Yet article 312 of the Salvadoran Penal Code interacts with article 133 to classify the failure to report an abortion as a criminal offense in all cases. Thus, no protocol that the State outlines will meet international standards because that would be incompatible with the law as it stands.

Other parts of the recommendation set out admirable goals, such as eliminating the use of stereotypes in the health and legal systems, but these are long-term measures and the ban itself epitomizes and entrenches precisely the stereotype of the “baby-killer” that is largely at fault. In other words, more immediate and less contingent remedies are urgently required. As noted by all of the leading international human rights authorities that have addressed this set of issues, nothing short of decriminalizing abortion can bring about the necessary results consistent with international guarantees.

Therefore, to effectuate the guarantee of equal protection for all in El Salvador, the Court should find the relevant law in El Salvador to be in violation of the obligations imposed on the State as a party to the Convention and other relevant treaties. It should call upon the State to repeal the abortion ban.

Applicant Details

First Name **Nitoya**
 Last Name **Munson**
 Citizenship Status **U. S. Citizen**
 Email Address nitoyabmunson@gmail.com
 Address

Address

Street
409 Fork Bridge Rd
 City
Elmer
 State/Territory
New Jersey
 Zip
08318

Contact Phone
 Number **3109998867**

Applicant Education

BA/BS From **Rutgers University-New Brunswick/
Piscataway**
 Date of BA/BS **May 2006**
 JD/LLB From **Georgetown University Law Center**
[https://www.nalplawschools.org/
employer_profile?FormID=961](https://www.nalplawschools.org/employer_profile?FormID=961)
 Date of JD/LLB **May 1, 2012**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Modern Critical Race Perspectives**
 Moot Court
 Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
 Externships **No**

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Fein, Bruce
bruce@thelichfieldgroup.com

Bradley, David
David.bradley@dc.gov

Fisher, David
David.fisher@dc.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Hello,

I am a Georgetown Law Graduate seeking to establish a fulfilling and challenging career. I am a detail-oriented individual and an excellent at communicating matters to a wider audience. I have worked alongside a constitutional lawyer responsible for upholding public policy through various methods, including contributing directly to the public sphere.

During my studies at Georgetown Law, I completed a program at the Universidad Torcuato di Tella in Argentina, where my focus was on cross-border insolvency cases and regulatory guidance provided by the ISDA. In addition, I acquired an immeasurable amount of skills at Georgetown Law and a broad knowledge base of law and legal analysis. Previously, I independently drafted and negotiated financial contracts under reciprocal MOU arrangements with a foreign agency, securing constructive terms for the client.

I have worked on many litigation teams, used eDiscovery software such as Relativity and Concordance, drafted legal memoranda, researched case and statutory law using LEXIS and Westlaw, and liaised with key industry professionals with an aim of communicating regulatory guidance. Notably, I was part of the Petrobras litigation team that led to a resignation and settlement for the affected shareholders who invested in Brazil.

Warm regards,

Brooke Munson, Esq.

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BROOKE MUNSON

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BAR

State of NY

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER

Washington, D.C.

Juris Doctor, Received February 2012

Annual GPA: 3.25

Best Courses: Corporations; Securities Law; Civil Procedure

Journal: *Executive Notes Editor*, Georgetown Journal of Law & Modern Critical Race Perspectives

PEPPERDINE UNIVERSITY

Los Angeles, California

Visiting Student, Spring 2011

UNIVERSIDAD TORCUATO DI TELLA

Buenos Aires, Argentina

Semester Abroad, Fall 2010

RUTGERS UNIVERSITY

New Brunswick, N.J.

Bachelor of Arts in Political Science, Minor in Spanish, May 2006

Honours: National Society of Collegiate Scholars (Honour Society); Carr Scholar (Full Academic Scholarship)

GPA: 3.65

UNIVERSITÀ DEGLI STUDI DI FIRENZE

Florence, Italy

Semester Abroad, Fall 2004

LEGAL EXPERIENCE

2012 - Present

Professional with broad knowledge base and skill set incorporating a fortified command of many areas of the law, including delivering E-Discovery management across many sectors. Strong capacity to promote workforce efficiency through strong sensitivity and multicultural literacy, with an acute command of regulatory and compliance guidance.

Selected Accomplishments:

- Negotiator for the acquisition of a subsidiary with \$66.5 million in assets.
- Repeated success negotiating for win-win terms on behalf of clients.
- Built and maintained strong relationships with key industry players and decision makers to advance company objectives and promote effective administration.
- Served as Subject Matter Expert (SME) with respect to regulatory compliance.
- Managed multiple reviews of attorneys, performed searches in several databases including but not limited to Relativity, Concordance and Recommind. Searches were central to the investigation and consisted of terms that targeted individuals suspected of statutory violations.
- Maintained full responsibility for internal Memorandums within time and budget parameters using platforms LexisNexis and Westlaw.

Specific Responsibilities:

Research of local, state, and federal laws; creation of market reports of various sectors; writing of memoranda; cold calling; liaising with key industry professionals; presentation materials; contract management; communicating with vendors; create quarterly newsletters; conduct conference calls; legal analysis, etc.

DOCUMENT REVIEW

Milbank

Contract Attorney 2020

Reviewed the communications in Portuguese of a CEO for alleged fraudulent activity in general. Coded documents privilege as necessary using the Relativity database.

Jenner & Block

Contract Attorney, 2017

Reviewed business documents, phone records and emails for a Colombian company in Spanish pursuant to an

investigation initiated by a Special Committee of the Board. Resolved cryptic language used by the CEO and his comrades which assisted in the discovery of a cartel operation masterminded by the CEO. Also found key documents which evidenced a wider scope of fraudulent activity. Translated documents and provided daily summaries of important information and incorporated it into a master chronology. Used the relativity database.

Labaton Sucharow

Contract Attorney, 2015

Combed through thousands of Portuguese documents, emails and phone records with an approaching deadline. Independently performed targeted searches in preparation for an interview of a sales employee of an international company. Found emails contradicting prior testimony which led to the discovery of more information about alleged anti-competitive behavior. Compiled a chronology of events pertinent to the investigation. Coded document privilege as necessary using the Relativity database.

Office of the Attorney General, DC

Law Clerk, January – December 2020

Washington, D.C.

Performed legal research, wrote memorandums, and assisted the commercial division attorneys in tax, public finance, and real estate. Result: Acquired excellent written and oral communication skills and thorough knowledge of legal research tools such as LEXIS and Westlaw. Successfully performed as second chair de facto in a tax litigation case.

British Government- United Kingdom Defence Procurement Office

Washington, D.C.

Contract Analyst, April 2007 - July 2009

Independently drafted and negotiated financial contracts with US Industry under US law for the procurement of defense equipment and services for the UK Armed Forces and British Defence Staff, and arranged for price and quality assurance audits of US suppliers under reciprocal MOU arrangements.

PROFESSIONAL EXPERIENCE

Australian Trade Commission Washington, D.C.

Business Development Manager - January 2006 - April 2007

Carried out the Australian Mission to promote business in the U.S. pursuant to AUSFTA (Australian-United States Free Trade Agreement). Performed research into various sectors of the U.S. market to increase market share, provide insight for Australians interested in doing business in the U.S. Organized meetings between high level executives. Crafted official Export Issues Summary document to be issued by Australian Government. Wrote reports for Business Development managers and organized client meetings between Australians and members of the World Bank.

OTHER EXPERIENCE

*MarketSource – Sales Representative (Awarded top regional sales representative) May 2005 – December 2005

*Rutgers Foundation – Student Development Sales Officer (Assisted in raising 5.1 million dollars in fiscal year 2004-2005)

*Hall Institute of Public Policy – NJ Executive Assistant for start-up company that published White Papers June 2004 – August 2004

LANGUAGES

Portuguese

Spanish

Italian

Japanese (beginner)

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Nitoya B Munson
GUID: 846484089

Course Level: Juris Doctor

Previous Degrees:

Bachelor of Arts Aug 31, 2006
Rutgers, State Univ of NJ
Newark NJ United States of America

Degrees Awarded:

Juris Doctor Feb 01, 2012
Georgetown University Law Center
Major: Law

Entering Program:

Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2008							
LAWJ	001	91	Civil Procedure	4.00	B	12.00	
LAWJ	004	12	Con Law I: Federal	3.00	C+	6.99	
LAWJ	005	14	Legal Research & Writing	3.00	IP	0.00	
LAWJ	008	91	Torts	4.00	B-	10.68	
				EHrs	QHrs	QPts	
Current				11.00	11.00	29.67	
Annual				11.00	11.00	29.67	
Cumulative				11.00	11.00	29.67	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2009							
LAWJ	002	91	Contracts	4.00	B-	10.68	
LAWJ	003	91	Criminal Justice	4.00	C	8.00	
LAWJ	005	14	Legal Research & Writing	4.00	B-	10.68	
LAWJ	007	91	Property	4.00	C+	9.32	
LAWJ	023	51	Lawmaking	3.00	B-	8.01	
LAWJ	611	01	Law in A Global Context	1.00	P	0.00	
				EHrs	QHrs	QPts	
Current				20.00	19.00	46.69	
Annual				31.00	30.00	76.36	
Cumulative				31.00	30.00	76.36	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2009							
LAWJ	163	79	European Union Law	3.00	B	9.00	
LAWJ	244	79	International Trade	3.00	B-	8.01	
				EHrs	QHrs	QPts	
Current				6.00	6.00	17.01	
Cumulative				37.00	36.00	93.37	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2009							
LAWJ	014	08	Current Issues in Transnational (Private) Law Seminar	2.00	C+	4.66	
LAWJ	038	07	Antitrust Law	3.00	B	9.00	
LAWJ	274	05	Law, Conscience, and Nonviolence Seminar	2.00	B	6.00	
LAWJ	317	07	Negotiations Seminar	3.00	A-	11.01	
LAWJ	741	08	Pre-Negotiation Strategies for Cross-Border Transactions	2.00	B-	5.34	
				EHrs	QHrs	QPts	
Current				12.00	12.00	36.01	
Cumulative				49.00	48.00	129.38	

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Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2010							
LAWJ	073	07	Communications Law and Policy	3.00	B+	9.99	
LAWJ	121	05	Corporations	4.00	A-	14.68	
LAWJ	342	07	Information Privacy Law	2.00	B-	5.34	
LAWJ	511	05	Introduction to Scholarly Editing Seminar	1.00	B+	3.33	
LAWJ	515	05	Externship Seminar	2.00	P	0.00	
				EHrs	QHrs	QPts	
Current				12.00	10.00	33.34	
Annual				30.00	28.00	86.36	
Cumulative				61.00	58.00	162.72	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2010							
LAWJ	303	16	Content Issues and Internet Se	3.00	B	9.00	
LAWJ	303	30	Content Iss/Internet Wri Req		B		
				EHrs	QHrs	QPts	
Current				3.00	3.00	9.00	
Cumulative				64.00	61.00	171.72	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2010							
LAWJ	648	01	Unv Torcuato Di Tella Registra	4.00	CR	0.00	
				EHrs	QHrs	QPts	
Current				4.00	0.00	0.00	
Cumulative				68.00	61.00	171.72	
2010-2011							
Transfer Credit: Jan 2011 - May 2011							
Pepperdine University							
School Total:							
						9.00	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2011							
				EHrs	QHrs	QPts	
Current				0.00	0.00	0.00	
Annual				7.00	3.00	9.00	
Cumulative				77.00	61.00	171.72	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2011							
LAWJ	1002	79	Intl Trade & Contract Law	3.00	B+	9.99	
LAWJ	322	16	Mediation Seminar	3.00	B+	9.99	
				EHrs	QHrs	QPts	
Current				6.00	6.00	19.98	
Cumulative				83.00	67.00	191.70	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2011							
LAWJ	165	07	Evidence		W		
LAWJ	708	10	Trade, IP Rights, & Public Health	2.00	B	6.00	
Transcript Totals							
				EHrs	QHrs	QPts	
Current				2.00	2.00	6.00	
Annual				8.00	8.00	25.98	
Cumulative				85.00	69.00	197.70	
End of Juris Doctor Record							

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Nitoya B Munson
GUID: 846484089

Course Level: Juris Doctor

Previous Degrees:

Bachelor of Arts Aug 31, 2006
Rutgers, State Univ of NJ
Newark NJ United States of America

Degrees Awarded:

Juris Doctor Feb 01, 2012
Georgetown University Law Center
Major: Law

Entering Program:

Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2008							
LAWJ	001	91	Civil Procedure	4.00	B	12.00	
LAWJ	004	12	Con Law I: Federal	3.00	C+	6.99	
LAWJ	005	14	Legal Research & Writing	3.00	IP	0.00	
LAWJ	008	91	Torts	4.00	B-	10.68	
				EHrs	QHrs	QPts	
Current				11.00	11.00	29.67	
Cumulative				11.00	11.00	29.67	
				GPA	RC		
Current				2.70	1.00		
Cumulative				2.70	1.00		
Spring 2009							
LAWJ	002	91	Contracts	4.00	B-	10.68	
LAWJ	003	91	Criminal Justice	4.00	C	8.00	
LAWJ	005	14	Legal Research & Writing	4.00	B-	10.68	
LAWJ	007	91	Property	4.00	C+	9.32	
LAWJ	023	51	Lawmaking	3.00	B-	8.01	
LAWJ	611	01	Law in A Global Context	1.00	P	0.00	
				EHrs	QHrs	QPts	
Current				20.00	19.00	46.69	
Annual				31.00	30.00	76.36	
Cumulative				31.00	30.00	76.36	
				GPA	RC		
Current				2.46	1.00		
Annual				2.55			
Cumulative				2.55	2.00		
Summer 2009							
LAWJ	163	79	European Union Law	3.00	B	9.00	
LAWJ	244	79	International Trade	3.00	B-	8.01	
				EHrs	QHrs	QPts	
Current				6.00	6.00	17.01	
Cumulative				37.00	36.00	93.37	
				GPA	RC		
Current				2.84	0.50		
Cumulative				2.59	2.50		
Fall 2009							
LAWJ	014	08	Current Issues in Transnational (Private) Law Seminar	2.00	C+	4.66	
LAWJ	038	07	Antitrust Law	3.00	B	9.00	
LAWJ	274	05	Law, Conscience, and Nonviolence Seminar	2.00	B	6.00	
LAWJ	317	07	Negotiations Seminar	3.00	A-	11.01	
LAWJ	741	08	Pre-Negotiation Strategies for Cross-Border Transactions	2.00	B-	5.34	
				EHrs	QHrs	QPts	
Current				12.00	12.00	36.01	
Cumulative				49.00	48.00	129.38	
				GPA	RC		
Current				3.00	1.00		
Cumulative				2.70	3.50		

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2010							
LAWJ	073	07	Communications Law and Policy	3.00	B+	9.99	
LAWJ	121	05	Corporations	4.00	A-	14.68	
LAWJ	342	07	Information Privacy Law	2.00	B-	5.34	
LAWJ	511	05	Introduction to Scholarly Editing Seminar	1.00	B+	3.33	
LAWJ	515	05	Externship Seminar	2.00	P	0.00	
				EHrs	QHrs	QPts	
Current				12.00	10.00	33.34	
Annual				30.00	28.00	86.36	
Cumulative				61.00	58.00	162.72	
				GPA	RC		
Current				3.33	1.00		
Annual				3.08			
Cumulative				2.81	4.50		
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2010							
LAWJ	303	16	Content Issues and Internet Se	3.00	B	9.00	
LAWJ	303	30	Content Iss/Internet Wri Req		B		
				EHrs	QHrs	QPts	
Current				3.00	3.00	9.00	
Cumulative				64.00	61.00	171.72	
				GPA	RC		
Current				3.00	0.28		
Cumulative				2.82	4.78		
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2010							
LAWJ	648	01	Unv Torcuato Di Tella Registra	4.00	CR	0.00	
				EHrs	QHrs	QPts	
Current				4.00	0.00	0.00	
Cumulative				68.00	61.00	171.72	
				GPA	RC		
Current				0.00	0.40		
Cumulative				2.82	5.18		
2010-2011							
Transfer Credit:				Jan 2011 - May 2011			
Pepperdine University							
School Total:				9.00			
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2011							
				EHrs	QHrs	QPts	
Current				0.00	0.00	0.00	
Annual				7.00	3.00	9.00	
Cumulative				77.00	61.00	171.72	
				GPA	RC		
Current				0.00	0.90		
Annual				3.00			
Cumulative				2.82	6.08		
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2011							
LAWJ	1002	79	Intl Trade & Contract Law	3.00	B+	9.99	
LAWJ	322	16	Mediation Seminar	3.00	B+	9.99	
				EHrs	QHrs	QPts	
Current				6.00	6.00	19.98	
Cumulative				83.00	67.00	191.70	
				GPA	RC		
Current				3.33	0.50		
Cumulative				2.86	6.58		
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2011							
LAWJ	165	07	Evidence		W		
LAWJ	708	10	Trade, IP Rights, & Public Health	2.00	B	6.00	
Transcript Totals							
				EHrs	QHrs	QPts	
Current				2.00	2.00	6.00	
Annual				8.00	8.00	25.98	
Cumulative				85.00	69.00	197.70	
				GPA	RC		
Current				3.00	0.20		
Annual				3.25			
Cumulative				2.87	6.78		
End of Juris Doctor Record							

SETTLEMENT CONFERENCE BRIEF**Re.: Mediation – Beyond the Frame adv. The People for the Ethical Treatment of Animals et al.****I. Introduction / Statement of the Case**

This is a case for copyright and moral rights infringement and related claims. It concerns the right of Beyond the Frame, a production company, to control the use and fate of its copyrighted film production. The action arises out of the People for the Ethical Treatment of Animals' ("PETA") calculated use and reckless exploitation of core scenes from the copyrighted film titled "The Animals Film." The film is owned and produced by Beyond the Frame (referred to hereinafter as "BTF" or "Plaintiff") and its principal Victor Schonfeld, an internationally-distinguished filmmaker with a wide range of cinema and television achievements and awards.

Specifically, PETA (referred to hereinafter as "the Defendant"), misappropriated well-known scenes from "The Animals Film" without the Plaintiff's consent for its own commercial benefit. The Defendant published, directed, and authorized third parties to publish the Plaintiff's copyrighted footage in no fewer than thirty (30) different motion picture projects, even explicitly passing off the Plaintiff's work as the Defendant's own in one motion picture project which aired on the famous Home Box Office network (HBO). Victor Schonfeld, the filmmaker of "The Animals Film" and the Plaintiff's principal, owns all rights to the content. Due to his tactful and unique way of portraying images of animal cruelty through film, he has caught the attention of many and is lauded around the globe by critics and the public alike. The acclaimed filmmaker has dedicated his career to depicting and documenting in an attention-grabbing fashion the inhumane and vile manner in which animals of all types are treated in the massive food production farms that supply most of the meats and animal products consumed by today's consumer.

It was in 1982 that the BTF's principal released "The Animals Film." The film was extraordinarily well received. It was recognized as capturing never-before-been-seen footage in a film of its type and lauded for the way it pieced together the scenes in a way that shocked and appalled the audience and brought to light previously unknown, though horrific, factory farming practices. Numerous positive reviews were published in the world's leading news outlets applauding the work, and the British National Film Archive and the

U.S. Library of Congress have each accessioned film prints of “The Animals Film” for preservation in their permanent collections.

A core part of the film has been cited to in numerous reviews as the film’s emotional and narrative heart. That part is the scene reflecting the “de-beaking” of a chicken. De-beaking refers to the process by which a chicken’s beak is removed via a method that is highly vicious, offensive, and almost impossible to watch, or whilst watching, turn away from. The beaks must be removed, it is told, so that the chickens, after being packed together in cages where they are unable to ambulate, will not peck one another to death. This section of footage in “The Animals Film” was found to be especially compelling to audiences around the world.

Prior to the conduct complained of, the BTF entered into discussion with the Defendant in regard to the above-mentioned film. The defendant failed to obtain a license from the BTF to exploit any part of the film, but did order hundreds of DVDs containing the entire motion picture. In 2009 and 2010, the BTF became aware that the PETA had misappropriated the “de-beaking” scene, amongst others, from “The Animals Film,” and had published or directed or authorized third parties to publish the footage in numerous different motion picture projects. The later discoveries were particularly galling because PETA had earlier indicated to BTF that it had only used the footage in a small number of projects, and BTF had objected to all such uses. The concealment of the scope of PETA’s infringement is evidence of willful infringement, as discussed below.

This widespread infringement was particularly vile because Victor Schonfeld has been vigorously outspoken in opposition to PETA. Although they may share the same cause, Schonfeld has been a vocal critic of how PETA campaigns in support of the cause. PETA’s use of naked women and porn stars to attract media attention to the animal rights cause is one issue on which the parties vehemently differ. Schonfeld, to distinguish himself from such groups, has written extensively about the need for animal right activists to promote their cause using a clear “moral baseline.” He feels that otherwise PETA, which uses naked woman and porn stars for media attention, will diminish the ideals of vegetarianism because it sexualizes and trivializes the cause. He shares his audience’s opinion that the tactics PETA uses are counterproductive and an obstacle to bringing a true end to animal exploitation. Schonfeld prides himself in his ability to propel the ideas of animal rights through other more dignified means. He uses creative processes to promote

the cause such as film and dramatic images of animal abuse. He would never want to be associated with using naked women in order to draw media attention to dying animals.

Despite Schonfeld's open opposition to PETA, PETA continued and continues to use key elements of the copyrighted work without authorization. In 2007, PETA exploited the memorable "de-beaking" footage by inserting it in a production created and produced by PETA in conjunction with Stick Figure Productions ("SFP") in conjunction with PETA. This program was aired on HBO. In the program, and right before the part in which a key segment from the Feature is exploited, PETA explicitly claims ownership and authorship of the footage from the Feature. This is not only a false attribution in violation of section 106(b) of the Copyright Act, it diminishes the public's connection - and the value of that connection - between Schonfeld, BTF, and the Feature's most memorable piece of footage.

PETA also continues to publish other excerpts from the film on-line, on television, theatrically and on DVD without the Plaintiff's consent. This publication was and is knowing and willful infringement, and include viral dissemination on video-sharing web sites and on branded PETA channels. On these sites and channels, PETA encourages all comers to copy and circulate the content from the Feature. This has resulted in widespread and massive piracy of the content.

The wrongful uses of the Feature by PETA are legion. In one representative example, a woman begins doffing her clothes while reciting the recent "achievements" by PETA. At the video's climax - the moment she removes her last item of clothing to reveal her naked body - the "debeaking scene" from the Feature is spliced jarringly into the video. This film, for which it goes without saying that BTF would not have granted a license, has been widely circulated online, and was created and released more than six months after BTF put PETA on notice of its unlawful use of the footage.

PETA is desperate to use the copyrighted footage because the organization is committed to producing controversial content. According to PETA's website, it seeks to use content that "evokes such strong emotions that people feel to tell the need to tell others" The use of content from the Feature makes this possible. PETA has established a marketing department with the goal of shocking the public with footage of animal abuse. By relying on colorful and amusing productions, PETA is able to draw more people to its cause in order to sustain its business. The goal is to reach new individuals for not only awareness, but to ensure that the supporters come back to "help fund [PETA's] programs." PETA's motive to engage its viewers sheds all the light required to explain why PETA was willing to

knowingly take the risk of ordering hundreds of videos from Schonfeld, and then publishing the most compelling portions of the Feature as its own.

The infringement at issue in this case is motivated not by an organization interested in educating the public, but by one that was and is fixated on using the animal abuse content to entertain its viewers for shock value so that they can “make headlines” and maintain its status as the largest animal rights group in the world. If doing so means knowingly exploiting and claiming to have authored the footage of an artist involved in the same cause, so be it. Of course, this is the exact type of thinking and conduct that the Copyright Act was promulgated to defeat.

This action was brought under the Copyright Act to address these violations of BTF’s rights in its copyrighted feature film, the damages done to the market for the film, and the damages to Plaintiff’s brand and goodwill as a result of the misattributed use of its footage.

II. BTF will Prevail at Trial

1. PETA willfully infringed Plaintiff’s copyrights in violation of the Copyright Act.

To establish a copyright infringement claim, BTF must demonstrate that it has ownership of a valid copyright and that there was unauthorized use of the copyrighted material by the PETA. *Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d 132, 135, 137 (2d Cir. 1998). There is no dispute that the BTF’s principal created, developed and authored the feature-length motion picture entitled “The Animals Film” (referred to herein as the “Feature”) and that the BTF owns the copyright to the film. The Feature was duly registered with the United States Copyright Office, which issued a registration certificate numbered PAU 148-168 to Plaintiff’s predecessor-in-ownership. The registration covering the Feature was later assigned to Plaintiff.

There is also no doubt that PETA accessed the content at issue. It ordered hundreds of DVDs containing the entire motion picture directly from BTF. PETA subsequently published, directed, and authorized third parties to publish verbatim key segments of the Feature to create no fewer than thirty-seven (37) different motion picture projects without the authorization of the Plaintiff. PETA also derived a substantial amount of money by publishing scenes from the Feature. One of these exploitations occurred in or around fall of 2007, when HBO aired a program entitled “I am an Animal,” produced and created by SFP in conjunction with PETA. In this program, an integral part from the Feature is exploited, and

PETA claims ownership and authorship of the Feature footage. Had PETA asked for permission to use the film, surely it would have been denied. In sum, there is no question that BTF can satisfy both prongs necessary to establish that PETA has committed copyright infringement.

2. The fair use exception does not excuse PETA's use of the video footage

PETA, knowing that it cannot escape liability for copyright infringement, will argue that its vast unattributed exploitation of the Feature constitute fair use. This defense fails. There are four main factors that courts will look at in determining fair usage: the purpose and character of the use, including whether its commercial or for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the work used; and the effect of the use upon the potential market for the value of the copyrighted work. 17 USC § 107.

All four these factors unquestionably tip in favor of the Plaintiff, leaving it beyond the bounds of possibility for PETA's actions to amount to fair use.

A. Any fair use defense fails

Any attempt by PETA to proffer a fair use defense will fail, as all factors considered by the Court when analyzing such a defense favor BTF.

(i) PETA's use was commercial and non-transformative

There are two sub-factors that are relevant in deciding the purpose and character of the use: (i) whether the use is for a commercial purpose and (ii) whether the work has been transformed to create a new work with a new meaning or message. *Castle Rock*, 150 F3d at 142.

(a) Commercial use

Peta absolutely used the video footage for commercial purposes. Although PETA is a non-profit organization and may argue that sharing the video to further its cause against animal cruelty, this does not give it a free pass to infringe on the artistic works of others, especially if the use is in bad faith. "Non-profit organizations enjoy no immunity from determinations of copyright violation." 807 F. Supp 1090, 1100-01 (SDNY 1992). Additionally, the mere fact that the use may be intended for an educational purpose and non-profit "does not insulate it from a finding of infringement." *Campbell*, 510 US 569.

Courts have specifically found that the posting of copyrighted content on the internet and allowing others to access it constitutes copyright infringement. *Marobie-FI, Inc. v. Nat'l Ass'n of Fire and Equip. Distributors and Northwest Nexus, Inc.*, 983 F.Supp. 1167 (N.D.Ill.1997); *Playboy Enterprises, Inc. v. Frena*, 839 F.Supp. 1552 (M.D.Fla.1993); *Playboy Enterprises, Inc. v. Webbworlworld, Inc.*, 968 F.Supp. 1171 (N.D.Tex.1997); *Sega Enterprises Ltd. v. MAPHIA*, 857 F.Supp. 679 (N.D.Cal.1994).

PETA's status as a non-profit will not change this analysis. The Supreme Court has addressed this issue on more than one occasion, finding that the non-profit status of an entity will not insulate it from liability if it uses copyrighted content in a commercial manner. The Supreme Court stated "the crux of the profit/nonprofit distinction is not whether the sole motive of the use in monetary gain but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985). In this case, the exploitation of BTF's content was to generate profits in the form of donations, and it worked; the non-profit status of PETA does not cleanse the infringement, or these profits.

Numerous Courts have also found that educational uses that are rendered for profit are not protected by fair use. See, e.g., *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1531 (SDNY 1991). Moreover, a non-profit educational company that reproduces the work of a rival will not be protected by the fair use defense. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F. 3d 1110, 1119 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001). In this case, there can be no argument that the primary purpose of the use was educational, as the content was used to promote the PETA brand and drive donations. Also, PETA took footage from an outspoken rival, and exploited it with knowledge that it did not own the footage.

In addition, the fact that PETA distributes the infringing content online for free does not provide it with relief. The only Court to address this issue found that offering for free the copyrighted content does not militate toward a finding of fair use. *Storm Impact, Inc. v. Software of Month Club*, 13 F. Supp. 2d 782, 789, (ND Illinois 1998). As discussed above, PETA deliberately used scenes from the Feature specifically for shock value, rather than to educate. In a similar case *Byrne v. British Broadcasting Corporation*, the Court ruled that in no instance is this acceptable. 132 F. Supp. 2d 229. The defendant BBC (a non-profit organization) also used a small excerpt of a copyrighted work (a political song) as part of its

news program. The Court found that the use of the work is not protected by fair use since the purpose of the use was to add entertainment value to the program rather than to inform. Additionally, the Court found that *even if* the copyrighted work is for informative purposes and not entertainment, it still constitutes an infringement if there are equally informative and non-infringing alternatives available. *Id.* at 234.

Because it was not necessary to include the copyrighted piece in the program, and because BBC used this piece of copyrighted work over other alternatives so that the production could be “more entertaining to viewers” the Court ruled against the broadcasting company. *Id.* Likewise, PETA cannot claim that the usage of footage from the Feature is to inform its viewers; PETA could have obtained its own footage to inform its supporters about animal cruelty. It strains credulity to believe that PETA was unable to produce its own footage in order to convey the cruelty of animals on its own, especially considering that PETA specializes in producing shocking content to move the emotions of its viewers in the first place.

PETA was cognizant of the fact that it would reap financial rewards and increased stature by exhibiting material that was artful and shocking. PETA came across Schonfeld’s work, appreciated the shock value inherent in the work, and chose to incorporate it into its own campaign. It did so without gaining authorization from BTF, and did not attribute to him authorship of content PETA knew BTF authored and owned. In some instances, PETA claimed to have authored and owned the footage. This is copyright infringement.

(b) Peta’s use was not transformative

PETA did not transform the purloined content, nor did it add any meaning or commentary. As such, PETA fails under this factor. The central purpose for understanding whether a work is transformative or not is to determine whether the new work merely supersedes and supplants the objects of the original creation. *Campbell*, 510 U.S. at 580. A work that merely supersedes or supplants the original is not protected by the fair use doctrine. *Id.* PETA must alter the original footage by adding “something new, with a further purpose or different character, thereby altering the first with a new expression, meaning, or message.” *Id.* In other words, PETA must add value to the original by adding “new information, new aesthetics, new insights and understandings.” *Leval* 1111. *See also Campbell*, 510 U.S. at 580; *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 541. The new work must have purposes distinct from the purpose of the original material. *Warner*, at 72-73;

quoting *Elvis Presley Enters.*, 349 F.3d at 629. PETA did nothing to transform the acclaimed “de-beaking” footage or any of the other defining scenes that it cribbed from the Feature. PETA not only copied parts of the Feature and included it in its own productions which delivered the same message of animal cruelty as the original film, but PETA went a step further and claimed to have authored the footage. This is not fair use.

The fact that PETA used the footage in new and discrete films that depict images of animal cruelty does not preclude infringement on the basis of fair use. As discussed, fair use only applies when these new productions transform the work in some way, add something to the work, or service a different market. None of these things apply. In essence, PETA’s films are nothing more than unlawful derivative works, which the Copyright Act specifically indicates can only be created with the authorization of the author of the original content. 17 U.S.C. S. 106. As discussed herein, this did not happen. As such, this factor can only favor BTF.

ii. The nature of the copyrighted work

The second factor inquires as to whether the works at issue are factual or creative; that is whether the original is imaginative or represents an investment of time in anticipation of a financial return.” *Rogers v. Koons* at 310. The fact that the Feature is a documentary will not afford PETA a greater license to steal. BTF here is not attempting to gain a monopoly over the facts that are revealed through the Feature, but only its *artistic expression* of the horrors of factory farming. *Roy Export, Etc.*, at 1144, citing *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57 (2d Cir. 1980). As Schonfeld will testify to at trial, there is an immense amount of artistic expression inherent in the capturing of the content at issue, from the lighting to the camera angle to the articulation and array of the material captured on film. While it is true that PETA “possessed an unfettered right to use any factual information” regarding factory farming, it had no right to misappropriate Plaintiff’s copyrighted expression of scenes reflecting those factual scenarios. *Id.*, citing *Iowa State*, *supra* at 61. In sum, PETA is liable for copyright infringement because “the fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.” *Id.*

In *Rogers*, the defendant made a sculpture which replicated a copyrighted image of puppies. The defendant tried to claim that the photograph was based on something factual. Following this logic the defendant argued that it had the right under the doctrine of fair use

to make a sculptor of that photograph since it was based on fact. The Court squarely rejected this argument. The plaintiff had gone “beyond the factual subject matter...to incorporate the very expression of the work created by the [plaintiff].” *Id.* at 312.

As discussed above, and like the photograph that the defendant copied in *Rogers*, the Feature is a work of art. There is no room for doubt that the Feature was a product of the creative and imaginative thought processes of Schonfeld and his team. Although he sought to convey fact through his film, the copyrighted work is a result of his talented ability to capture images using unique camera angles, and the juxtaposition of that footage in such a way that it elicited a strong emotional response from his audience. His innate ability allowed him to capture the abuse of animals using different perspectives and succeeded in capturing never-before-seen footage which became the essence of the Feature. This artistic merit is evidenced by the Features’ reviews. Hollywood Reporter commented that the Feature “explored with shocking vividness” animal cruelty, and had “stunning photography.” The acclamation that the film received is directly attributable to the artful way in which the scenes were captured. As a result of the attention the scenes in the film garnered, the Feature has been accessioned by both The British National Film Archive and the U.S. Library of Congress for preservation in their permanent collections. In other words, the stolen footage is not a rote reflection of a collection of facts, like a phone book; but, is instead an intensely expressionistic piece of art.

PETA willfully used this art in an effort to encourage and stimulate donations, and pandered to the same market that existed, and exists, for the Feature. This factor can only favor BTF.

iii. The amount and substantiality of the work used

This factor also favors the Plaintiff. It addresses “the amount and substantiality of the portion used in relation to the copyrighted work as a whole. 17 U.S.C. 107(3). The factor favors copyright holders where the portion used by the defendant is the heart of the copyrighted work. *Harpers*, 471 U.S. 539, at 565. In *Roy Export Co. Establishment v. Columbia Broadcasting System, Inc.*, the defendant CBS used several key segments in a variety of productions from a number of the Plaintiff’s films. One of those clips lasted one minute and fifteen seconds and was taken from a one hour and twenty minute film. Despite the short length of these scenes that CBS used, the Court concluded that CBS did not satisfy the third factor because the film clips it used were among the plaintiff’s most powerful. 503 F.Supp. 1137, 1146. Likewise, in *Harpers v. Row Publishers*, the Supreme

Court found that the use of a small portion of the Plaintiff's work which qualified as the most powerful part of an entire work, was qualitatively substantial, and was not fair use. 471 U.S. 539, 565.

The same is true of the footage stolen by PETA. Among others, the Sunday Times in the UK raved about Victor Schonfeld's Feature because it presented newly-shot scenes that were never before professionally captured. Other publications, such as the Arizona Daily Star made remarks about Schonfeld's genius in capturing images of animal cruelty in a unique way, moving people who really haven't given animal cruelty much thought in the past. The scenes referenced in these reviews are the most powerful scenes in the Feature, and, not coincidentally, are the scenes that have been misappropriated by PETA.

PETA may argue that only short segments of the Feature are used, and the content used is a small portion of the entire Feature, and a small portion of the infringing films created by PETA. This argument fails, however, given the discussion above: the content used is the most valuable in the film and its exploitation has a deleterious effect on the market for the Feature. *Id.* at 566. Why would anyone purchase and view the entire Feature when he or she can see the best bits for free courtesy of PETA? The case law supports this position, especially when, as here, the copying is 100 percent verbatim. *Roy Export Co.*

Establishment, *supra*, 503 F. Supp. 1137 (SDNY 1980)(one minute fifteen seconds of one hour twelve minute motion picture used; fair use denied on this factor); *Harper*, 471 U.S. 539 (300 out of 200,000 words copied; fair use denied on this factor); *Telerate Sys., Inc. v. Caro*, 689 F. Supp. 221, 229 (SDNY 1988)(a few pages out of 20,000 copied; fair use denied on this factor); *see also*, *Lamb v. Starks*, 949 F. Supp. 753, 757 (N.D. Cal. 1996).

PETA purposely, and with knowledge of the illegality of doing so, took the most memorable, striking, and highlighted moments from the Feature, and presented them as its own in order to reach and stimulate gives by the public. It knew that the Feature belonged to BTF, yet failed to obtain from it a license to use the footage. This knowing misappropriation by PETA is grounds for rejecting the fair use defense. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562-563 (1985).

PETA used the most emotion-provoking parts of the original Feature for its own commercial benefit—scenes that Schonfeld was originally praised for creating by numerous respected critics. PETA cannot dispute that the footage it used in its productions and that which it published originated from the Feature. This footage, including the never-before-seen footage of de-beaking, was a core aspect of the film and attributed highly to its success.

iv. The effect of the use upon the potential market for the value of the copyrighted work

This final factor is the “single most important element of fair use.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. at 564-565. Courts will consider (i) harm to the market for the original work, (ii) harm to the market for derivative works, and (iii) harm to the copyright owner if the infringing use is widespread. See *Campbell*, 510 U.S. at 590. “The relevant market effect is that which stems from the defendant’s use of plaintiff’s expression, not that which stems from defendant’s work as a whole.” *Arica Institute v. Palmer*, 970 F. 2d 1067, 1078 (2d. Cir. 1992). If the unauthorized use of the copyrighted work is for commercial gain, however, then likelihood of significant market harm is presumed. *Campbell*, 510 U.S. at 590; quoting *Sony*, 464 U.S. at 451. In this case, there is no question that PETA realized significant revenues during the period in which it used BTF’s footage to market itself, build its online audience, and spur donations.

In *Rogers*, discussed *supra*, the defendant profited by infringing on the copyrighted work; thus it was presumed that the plaintiff would experience a likelihood of future harm to the copyrighted work and his market. Likewise, the unrestricted and widespread conduct by PETA, including making footage from the Feature available for download and viral dissemination, “licensing” such footage to third-party producers, and claiming on HBO that it was responsible for procuring BTF footage, will result in a substantially adverse impact on the market for the original copyrighted work. PETA has selectively chosen the most impactful and compelling segments of the Feature, and incorporated said content into dozens of its own films. PETA has also distributed directly and indirectly the content to numerous third parties and urged them to further exploit the footage. As a direct result of this infringing conduct, PETA has raised a substantial amount of revenue, and continues to do so to-date. The result of the above conduct by PETA is to devalue and replace the market for the Feature. The most memorable bits from the Feature, as exploited by PETA, are now widely available and viewable on the internet, DVD, and cable television, and have been forever and inexorably tied to the PETA movement. There is no question that this factor favors BTF.

B. Inducement of infringement under Grokster and secondary liability

In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S.Ct. 2764, 162 L.Ed.2d 781(2005) ("*Grokster*"), the Supreme Court stated a new basis for liability under the Copyright Act: inducement of infringement. See 3-12 151 NIMMER ON COPYRIGHT § 12.04[A][3][b][ii]. A party that distributes content with the intent of "promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." 545 U.S. at 936-37, 125 S.Ct. 2764. This happens when one "entic[es] or persuad[es] another" to infringe, Black's Law Dictionary 790 (8th ed. 2004), as by advertising. An infringer that "not only expected but invoked [infringing use] by advertisement" was liable for infringement "on principles recognized in every part of the law." *Kalem Co. v. Harper Brothers*, 222 U.S., at 62-63; *Henry v. A. B. Dick Co.*, 224 U.S., at 48-49; *Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co.*, 75 F. 1005, 1007-1008 (CA2 1896).

This new rule "premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose." *Id.* at 937, 125 S.Ct. 2764. Knowledge that one is distributing a copyrighted work to third parties, and knowledge that these third parties may further distribute the work, and realizing profits through this distribution, will subject one to liability under this doctrine. *Id.* at 939-40, 125 S.Ct. 2764, *see also id.* at 926, 125 S.Ct. 2764. In this case, it is clear that PETA, in offering content from the Feature on its website with a disclaimer that it was not subject to copyright protection, and with knowledge that it would be downloaded and distributed, is liable for inducement. In addition, PETA provided this footage directly to third parties - e.g., Stick Figure Productions, Home Box Office, Farm Sanctuary, Universal Music Group - and indicated to them that the footage lacked copyright and/or was proprietary to PETA and free to be exploited. Finally, PETA realized significant profits in the form of donations from those that visited its websites, watched the films, and downloaded and distributed the films. As the Court notes, "[t]he classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations." *Id.* at 937, 125 S.Ct. 2764. This is precisely what PETA has done in this case, and it is liable for inducement of infringement.

PETA is also liable for contributory infringement. Contributory copyright infringement "is a form of secondary liability with roots in tort-law concepts of enterprise liability and imputed intent." *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794-95 (9th

Cir.2007), *cert. denied*, 128 S.Ct. 2871, 171 L.Ed.2d 811 (2008). PETA is liable for contributory infringement because "with knowledge of the infringing activity," it "induce[d], cause[d], or materially contribute[d] to the infringing conduct of another." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir.1971). Specifically, it knew that it was distributing copyright infringing conduct to third parties by posting content from the film on its websites and video-sharing sites, and made overt steps to induce and cause that conduct by posting and allowing the content to be downloaded.

The requisite knowledge for contributory infringement liability may be actual or constructive. *Faulkner v. Nat'l Geographic Soc'y*, 211 F.Supp.2d 450, 474 (S.D.N.Y. 2002), *aff'd*, *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26 (2d Cir.2005); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir.2001). Turning a "blind eye" to infringement has also been found to be the equivalent of knowledge. *Aimster*, 334 F.3d at 650. As such, it is not required that Plaintiff prove that PETA had knowledge of specific infringement in order for a finding of contributory infringement to lie. *See Arista Records, Inc. v. Flea World, Inc.*, No. 03-2670(JBS), 2006 WL 842883, at *14, 2006 U.S. Dist. LEXIS 14988, at *47-48 (D.N.J. Mar. 31, 2006). In posting content from the feature on its website, and directly transmitting it to third parties such as Stick Figure productions, PETA committed actionable contributory infringement. Finally, PETA is liable for vicarious infringement because it had the ability to supervise the infringement – in the form of downloads and third party distributions of BTF's content - and failed to do so while profiting.

II. Statement of Damages

1. Actual Damages and Infringers' Profits

Under the 1976 Copyright Act, a copyright owner who prevails in an infringement action is "entitled to recover the actual damages suffered by them as a result of the infringement, and any profits of the infringer that are attributable to the infringement." 17 U.S.C. § 504(b). BTF will seek its actual damages in the form of lost royalties and a diminution in the market value of the Feature, the direct and indirect - in the form of donations-profits obtained by PETA while using the Feature content to market itself, statutory damages in connection with the illegal downloads made possible by PETA, and the illegal third-party distribution or "licenses" authorized by PETA. BTF will also seek interest, costs, and attorneys' fees.

A. Actual Damages

These “actual damages” represent the extent to which infringement has injured or destroyed the market value of the copyrighted work at the time of infringement. *In Design v. K Mart Apparel Corp.*, 13 F.3d 559, 563 (2d Cir. 1994). This injury in the marketplace does not hinge on the defendant’s innocence or willfulness, but focuses on the damage done to the plaintiff’s market for its proprietary content. *Fitzgerald Publ. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1118 (2d Cir. 1986). Damages will be granted based on “market value,” or what revenue would have accrued to the plaintiff **but for the infringement**. *Montgomery*, 1294 (11th Cir. 1999); *Key West Hand Print Fabrics, Inc., v. Serbin, Inc.*, 269 F. Supp. 605, 613 (S.D. Fla. 1965) (emphasis added). Any uncertainty as to the amount of these actual damages will not preclude their recovery. *Davis v. The Gap, Inc.*, 246 F.3d 152, 164, 167 (2d Cir. 2001). Actual damages may be also calculated as the “value of use” to the infringer when circumstances render it difficult for the defendant to quantify his actual damages. *Deltak, Inc. v. Advanced Systems, Inc.*, 767 F. 2d 357 (7th Cir. 1985). One proper measure of damages is a recapture of the license fees that would have been acquired but for the infringement for the plaintiff’s actual damages. *Encyclopedia Brown Prods., Ltd. v. Home Box Office*, 25 F. Supp. 2d 395, 400-01 (S.D.N.Y. 1998). Stated differently, it is the market value for the content that was used without permission, or “what a willing buyer would have been reasonably required to pay to a willing seller for [the infringed party’s] work” . *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1174 (9th Cir.1977); see also *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co.*, 542 F.Supp. 252, 262-63 (D.Neb.1982); *Nucor Corp. v. Tennessee Forging Steel Serv., Inc.*, 513 F.2d 151, 152-53 (8th Cir.1975); *Atlantic Monthly Co. v. Post Pub. Co.*, 27 F.2d 556, 560 (D.Mass.1928).

At trial, Plaintiff will present evidence that the reasonable value is at least the British Film Institute rate for a worldwide, non-exclusive license for use in connection with each of the infringing PETA projects. In addition, it will provide expert testimony that the market for the license and sale of the Feature’s footage has been significantly devalued by PETA’s exploitation.

B. Direct Profits & Indirect Profits

In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work." 17 U.S.C. 504; see also *Rogers* at 313. The infringer may not deduct overhead expenses when the conduct in violation of the plaintiff's copyrights is deliberate and willful. *Kamar Intern., Inc. v. Russ Berrie and Co., Inc.*, 752 F. 2d 1326, 1331 (9th Cir. 1984). "In performing the apportionment, the benefit of the doubt must always be given to the plaintiff, not the defendant." *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1549 (9th Cir. 1989). Both direct profits and indirect profits are recoverable. See *id.* Finally, consideration must be given to the qualitative power of the video segments of the Feature, rather than on how long the segments were when they are incorporated in a larger production. See *id.* at 1549 (explaining that the apportionment should not place too high a value on the defendant's work at the expense of undervaluing the plaintiff's more *substantive* creative contributions).

BTF would be entitled to all profits derived by PETA in the period of time in which PETA was exploiting the Feature - both directly in the form of the almost 40 projects PETA created and posted exploiting the content, and indirectly to the extent it was distributing BTF's content to third parties and visitors to its website in the form of encouraged downloads. In other words, all profits derived by PETA in this time would be subject to disgorgement, with the onus on PETA to establish the portion of these profits/attributable to factors other than the use of BTF's copyrighted content. This burden will be difficult to discharge given that PETA has chosen to incorporate content from the feature in dozens of films, including its most popular pieces, failed to attribute any of the uses, and exploited the content by deploying it as the climactic, opening, or closing scene in the features. The uses are also clearly positioned to promote the PETA brand, as the PETA name and logo are constantly displayed onscreen as the content from the Feature plays. Finally, these uses by PETA were willful; viz., the exploitation by PETA occurred while PETA knew such uses were not authorized by BTF, and infringed BTF's copyright in the Feature.

Frank Music is particularly instructive in this regard. In *Frank Music*, the plaintiffs owned the copyrights to a movie. Snippets of the movie were replicated through Acts of an on-stage theater production that was featured inside of MGM Grand casino. Not only was revenue raised directly through the purchase of theater tickets, but the Court also found that there was substantial indirect revenue that was raised by MGM Grand casino as a result of

the play being featured in its quarters. The play, containing Acts that reflected scenes of the copyrighted film, served an important advertising and promotional role in bringing revenue to the MGM Grand casino itself. *Id.* at 1550.

This factual scenario is directly on point. PETA not only earned profits from the direct use of scenes from the Feature, but it also marketed and posted online key segments of the Feature to attract sponsors and donors to its cause. PETA's Marketing Department deliberately made use of these emotional scenes to elevate PETA's campaign and to attract the funds from the sponsors that PETA needed to sustain its business. Notwithstanding the fact that PETA is a non-profit, it uses these funds specifically to further its campaign and sustain its presence in the media in a manner that is offense to the plaintiff. Had BTF and its principal been given the opportunity, permission would not have been granted for PETA to use their copyrighted work to earn money and thereby propel itself using a campaign that involves naked women and porn stars and brings scandal and disrepute to the animal rights cause.

2. Statutory Damages

In the alternative, Plaintiff, as the owner of a valid copyright, registration of which predated the infringement at hand, may elect, at any time before final judgment is entered, to recover statutory damages against the Defendants. 17 U.S.C. §§ 412, 504(c)(1); *Original Appalachian Artworks, Inc., v. Yui Int'l Trading Corp.*, 5 U.S.P.Q. 2d 1516, 1523 (S.D.N.Y. 1987). It is unnecessary for those seeking statutory damages to submit proof of damages and/or profits. BTF may choose to seek a statutory award in connection with each of the 37 uses by PETA, as well as each download or online distribution made possible by PETA's hosting of and making available the footage.

3. Costs and Attorneys' Fees

Plaintiff is also entitled to recover its costs and attorneys' fees. The Copyright Act expressly allows an infringed party to allow recovery of full costs. 17 U.S.C. § 505. Section 505 further provides that the court may award reasonable attorneys' fees as part of the costs, so long as the work at issue was registered with the Copyright Office prior to commencement of the infringement. *Id.*; 17 U.S.C. § 412(2). Finally, awards of attorneys' fees are the rule, rather than the exception, and are awarded routinely. *McCullough v. Albert E. Piece, Inc.*, 823 F.2d 316, 322 (9th Cir. 1987). In this case, given the strong evidence of access and

substantial similarity, and the fact that infringement was initially willful - in the sense that PETA knew it was exploiting the copyrighted work of another without authorization - and willful to a greater degree once it received notice from BTF of the infringement, and continued to engage in the infringing conduct for which it was now on notice. As such, it is probable that such costs and fees will be recompensed.

III. Conclusion

In sum, there is no issue as to Defendant's liability for copyright infringement given that it is clear that Plaintiff owns a valid copyright for the Feature, substantial similarity is clear, and fair use fails as a defense.

Applicant Details

First Name	Sophie
Last Name	Nguyen
Citizenship Status	U. S. Citizen
Email Address	snguyen@jd22.law.harvard.edu
Address	<div> Address Street 219 Western Ave, Apt. S515 City Allston State/Territory Massachusetts Zip 02134 Country United States </div>
Contact Phone Number	7142745189

Applicant Education

BA/BS From	Princeton University
Date of BA/BS	May 2017
JD/LLB From	Harvard Law School
	https://hls.harvard.edu/dept/ocs/
Date of JD/LLB	May 26, 2022
Class Rank	School does not rank
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Steiker, Carol
steiker@law.harvard.edu
617-496-5457

Warren, Alvin
warren@law.harvard.edu
617-495-3186

Churchill, Steve
steve@fairworklaw.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SOPHIE T. NGUYEN

219 Western Avenue, Allston, MA 02134 ♦ (714) 274-5189 ♦ snguyen@jd22.law.harvard.edu

February 9, 2022

The Honorable John D. Bates
United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing to express my interest in a clerkship in your chambers for the 2022 term. I am currently a third-year student at Harvard Law School and a Supervising Editor of the Harvard Journal on Legislation.

Enclosed are my resume, law school transcript, and writing sample. The writing sample is an opposition to a motion for class certification that I wrote while taking Class Actions: Litigating Advanced Topics with Professor Richard Clary in the fall of 2021. The below individuals are submitting letters of recommendation separately and welcome inquiries in the meantime:

- Professor Carol Steiker, Harvard Law School
- Professor Alvin Warren, Harvard Law School
- Steve Churchill, Harvard Law School and Fair Work, P.C.

I have accepted an offer to join Skadden, Arps, Meagher & Flom LLP's New York City office as an Associate in the Complex Litigation & Trials group and plan to work there after clerking.

I would welcome any opportunity to interview with you. Thank you in advance for your consideration.

Sincerely,

Sophie Nguyen

Enclosures

SOPHIE T. NGUYEN

219 Western Avenue Apt. S515 ♦ Allston, MA 02134 ♦ (714) 274-5189 ♦ snguyen@jd22.law.harvard.edu

EDUCATION

HARVARD LAW SCHOOL, Candidate for Juris Doctor May 2022 (Expected)

Honors: Dean's Scholar Prizes in Capital Punishment in America and Taxation
Activities: Journal on Legislation (Supervising Editor)
Office of Career Services Peer Advisor
1L Reading Group: The Trump Presidency in Court

PRINCETON UNIVERSITY, Bachelor of Arts, French/Public & International Affairs, *summa cum laude* June 2017

Honors: Prix du Cercle Français, awarded to best senior thesis in French, 2017
R. Percy Alden Memorial Prize, awarded to best junior in French, 2016
Activities: Expressions Dance Company
Peer Academic Advisor
Worked 25 hours per week in the dining hall as a Student Coordinator and Shift Manager and 4 hours per week as a Lead Caller in the Office of Annual Giving to finance education
Thesis: *When History Eclipses Memory: Pied-Noir Memory Preservation in Contemporary France*

INSTITUT D'ÉTUDES POLITIQUES DE PARIS (SCIENCES PO) Spring 2016

Semester abroad with coursework in politics, history, law, and international affairs taken entirely in French.

EXPERIENCE

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, New York City, NY (Remote)

Summer Associate May-July 2021
Conducted legal research on issues that arose in the Complex Litigation and Trials, International Arbitration, Mass Torts, and Government Enforcement groups. Participated in the firm's litigation training and worked on extensive pro bono projects, including one challenging state SNAP benefits distribution during the COVID-19 pandemic.

U.S. DEPARTMENT OF JUSTICE, Washington, D.C. (Remote)

Intern, Criminal Division (Fraud Section) June-July 2020
Conducted independent research and drafted memos on contested areas of criminal law. Prepared motions, briefs, and sentencing memos. Compiled evidence for extensive healthcare fraud conspiracy investigation. Edited DOJ guide to the Foreign Corrupt Practices Act. Participated in multiple rounds of treaty negotiations with the United Kingdom.

BLACKROCK, Princeton, NJ and San Francisco, CA

Investment Management Associate, U.S. Wealth Advisory 2018-2019
Managed relationships with thousands of Edward Jones financial advisors in the Pacific Northwest and San Francisco Bay Area. Consulted on portfolio construction and fixed income/ETF implementation. Analyzed portfolios to find best possible solutions for different client scenarios, generating hypotheticals and synthesizing findings for financial advisors. Traveled to client offices to present BlackRock investment solutions and discuss financial markets.

Analyst, Advisor Services Group, U.S. Wealth Advisory

Summer 2016, 2017-2018
Managed operations for three sales teams and coordinated full-scale client support by analyzing portfolios, taking inbound phone calls, and conducting proactive sales outreach campaigns. Won analyst presentation competition judged by U.S. Wealth Advisory management. Earned peer-nominated award for outstanding performance.

IMMIGRATION SOLUTIONS, LLC, Boston, MA

Legal Intern July-August 2015
Acted as interpreter for Francophone clients in initial consultations with the firm's immigration attorneys. Engaged with local immigrant communities through social media and cultural organizations to expand the firm's client base. Conducted research for asylum cases, collected evidence for marriage petitions, and completed citizenship applications.

PERSONAL

Dual French-American citizen, professional working proficiency in French. Classically trained ballet dancer, yoga, cycling, and weightlifting enthusiast, and aspiring long-distance runner.

HARVARD LAW SCHOOL - STUDENT SELF SERVICE

Unofficial Transcript

Sophie T Nguyen

1/27/2022

3L, Section 6

Fall 2019 Term: Aug 27 - Dec 18

Course Code	Title	Primary Instructor	Grade	Credits
1006	First Year Legal Research and Writing 6A	Salib	H	2.00
1000	Civil Procedure 6	Greiner	H	4.00
1005	Torts 6	Hanson	H	4.00
1001	Contracts 6	Bar-Gill	P	4.00
1002	Criminal Law 6	Rabb	P	4.00
Subtotal:				18.00

Winter 2020 Term: Jan 6 - Jan 24

Course Code	Title	Primary Instructor	Grade	Credits
1055	Introduction to Trial Advocacy	Sullivan	CR	3.00
Subtotal:				3.00

Spring 2020 Term: Jan 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

Course Code	Title	Primary Instructor	Grade	Credits
1004	Property 6	Singer	CR	4.00
1006	First Year Legal Research and Writing 6A	Salib	CR	2.00
1003	Legislation and Regulation 6	Renan	CR	4.00
2485	Democracy, the Incomplete Experiment	Robinson	CR	2.00
1024	Constitutional Law 6	Bowie	CR	4.00
Subtotal:				16.00

Fall 2020 Term: Sep 1 - Dec 31

Course Code	Title	Primary Instructor	Grade	Credits
2020	Capital Punishment in America <i>* Dean's Scholar Prize</i>	Steiker	H*	3.00
2069	Employment Law	Sachs	H	4.00
2028	Comparative Constitutional Law	Jackson	P	4.00
2537	Introduction to Finance Concepts 4-Day Section	Dharan	CR	1.00
			<i>Subtotal:</i>	12.00

Winter 2021 Term: Jan 1 - Jan 22

Course Code	Title	Primary Instructor	Grade	Credits
7000W	Independent Writing	Jackson	H	1.00
			<i>Subtotal:</i>	1.00

Spring 2021 Term: Jan 25 - May 14

Course Code	Title	Primary Instructor	Grade	Credits
2234	Taxation <i>* Dean's Scholar Prize</i>	Warren	H*	4.00
2651	Civil Rights Litigation	Michelman	H	3.00
2071	Employment Law Workshop: Strategies for Social Change	Churchill	H	2.00
8012	Employment Law Clinic	Churchill	H	3.00
2000	Administrative Law	Vermeule	H	4.00
			<i>Subtotal:</i>	16.00

Fall 2021 Term: Sep 1 - Dec 3

Course Code	Title	Primary Instructor	Grade	Credits
2024	Class Actions: Litigating Advanced Topics	Clary	H	2.00
2293	Drug Product Liability Litigation	Grossi	H	2.00
8015	Government Lawyer: Attorney General Clinic	Tierney	H	5.00
2237	The Role of the State Attorney General	Tierney	H	2.00
2169	Legal Profession	Wacks	P	3.00
			<i>Subtotal:</i>	14.00

Winter 2022 Term: Jan 4 - Jan 21

Course Code	Title	Primary Instructor	Grade	Credits
2050	Criminal Procedure: Investigations	Seo	~	3.00
<i>Projected Subtotal:</i>				3.00

Spring 2022 Term: Feb 1 - Apr 22

Course Code	Title	Primary Instructor	Grade	Credits
2551	The Roberts Court: Theory and Practice	Gershengorn	~	2.00
2035	Constitutional Law: First Amendment	Feldman	~	4.00
2086	Federal Courts and the Federal System	Goldsmith	~	5.00
<i>Projected Subtotal:</i>				11.00

Projected Total: 94.00

PRINCETON UNIVERSITY

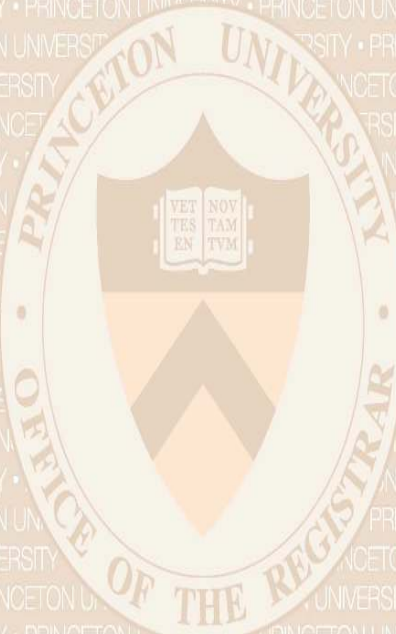
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Sophie Nguyen | 535

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PRINCETON UNIVERSITY

SOPHIE THANH XUAN NGUYEN ----Continuation of transcript

	Spring Term 2016-2017 (Senior)	Grade	Courses
HIS 370	Britain from the American Revolution to	A	1.0
POL 316	Civil Liberties	A	1.0
FIT	Senior Departmental Exam	A+	
FIT	Senior Thesis	A	2.0

REMARKS:

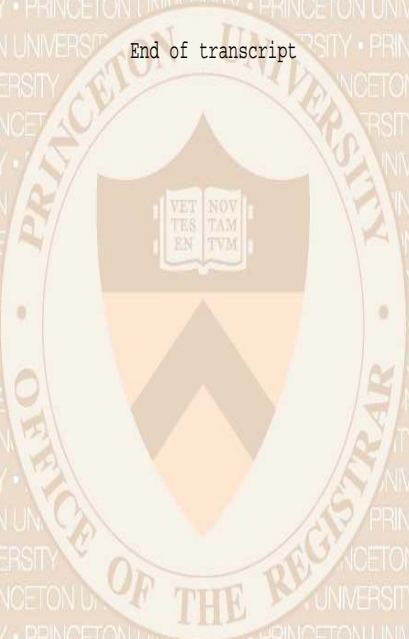
2015-2016 Awarded THE R. PERCY ALDEN MEMORIAL PRIZE IN FRENCH

2016-2017 Awarded THE PRIX DU CERCLE FRANCAIS DE PRINCETON

Received the European Cultural Studies Certificate at Graduation

Received the Contemporary European Politics and Society Certificate at Graduation

End of transcript



Polly Wintrey Griffin
Polly Wintrey Griffin, Registrar

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PRINCETON UNIVERSITY

GRADING SYMBOLS**In undergraduate courses (numbered below 500) and independent work**

- A+ Exceptional; significantly exceeds the highest expectations for undergraduate work
- A Outstanding; meets the highest standards for the assignment or course
- A- Excellent; meets very high standards for the assignment or course
- B+ Very good; meets high standards for the assignment or course
- B Good; meets most of the standards for the assignment or course
- B- More than adequate; shows some reasonable command of the material
- C+ Acceptable; meets basic standards for the assignment or course
- C Acceptable; meets some of the basic standards for the assignment or course
- C- Acceptable, while falling short of meeting basic standards in several ways
- D Minimally acceptable; lowest passing grade
- F Failing; very poor performance
- P Grades of A+ through C- in courses taken on pass/D/fail basis (prior to 1988-89, earned grades of A+ through D were converted to P) Satisfactory
- AUD Completion of required work in a course taken on an audit basis
- INC Course not completed at end of term (late completion authorized)
- T Course successfully completed at another institution for Princeton credit
- UNR Course grades not reported by instructor
- W Student withdrew from the University after the term's ninth week of class

In graduate courses (numbered 500 and above)

With the exception of T and W, all of the foregoing grading symbols are used in graduate courses. The following symbols may also appear:

- HP High Pass (used in some graduate courses in the School of Architecture)
- LP Low Pass (used in some graduate courses in the School of Architecture)
- N or * No grade given in the course. Between 1948-49 and 1973-74, represented by N; from 1974-75, represented by *

GRADING POLICY 2004-2014

From fall term 2004-05 through spring term 2013-14, the faculty had a common grading expectation for every department and program: A's (A+, A, A-) were to account for less than 35 percent of the grades given in undergraduate courses and less than 55 percent of the grades given in junior and senior independent work. Each department or program determined how best to meet these expectations. In the fall term 2014-15, the faculty reaffirmed rigorous and transparent assessment measures and removed a numeric target for the percent of A grades.

COURSE OF STUDY

Undergraduate students at Princeton enroll in a four-year course of study as candidates for the degree of Bachelor of Arts (A.B.) or the degree of Bachelor of Science in Engineering (B.S.E.). Undergraduate course credit is awarded in the form of course units. Each undergraduate course is one course unit; one course unit may be considered the equivalent of 4.0 semester hours. The A.B. program consists of eight terms of full-time study to satisfy the requirement of 31 courses (30 courses for students matriculating before 2001). Beginning in the junior year a candidate for the A.B. degree undertakes a program of departmental concentration including course work, independent study in the junior year, a two-term senior thesis, and a departmental examination at the end of the senior year. The B.S.E. program consists of eight terms of full-time study to satisfy the requirement of 36 courses, which usually include one or two terms of independent work. B.S.E. students pursue departmental concentrations beginning in the sophomore year. Prior to fall term 1974-75, an undergraduate's departmental courses were indicated by a (D) preceding the course title. In addition to the departmental concentration, many students elect to pursue certificates in one or more programs, nearly all of which are interdisciplinary.

Graduate students pursue full-time study toward the Ph.D. degree in the arts and sciences, engineering, architecture, and public affairs; and final professional master's degrees in architecture, engineering, finance, Near Eastern studies, public affairs, and public policy. To qualify for the Ph.D., a candidate spends at least one academic year in residence, passes the general examination, presents an acceptable dissertation, and passes the final public oral examination. Additional requirements for the Ph.D. vary by program. Ph.D. candidates may earn a Master of Arts degree incidentally as part of the course of study toward the Ph.D. Requirements for a final professional master's degree vary by program. Graduate students who are enrolled full time and in residence hold regular student status as they pursue work toward the degree. Students registered *in absentia* are also enrolled full time but are absent from campus in order to make use of materials, facilities, and expertise not available in residence. In their last years of enrollment, the majority of post-graduate Ph.D. students take no courses, but pursue full-time research toward completion of the dissertation. Ph.D. students who come to the end of the defined program length without having completed all requirements for the degree may hold dissertation completion enrollment (DCE) status for up to two years and enrollment terminated/degree candidacy continues (ET/DCC) status thereafter. DCE students are enrolled students. ET/DCC students are not enrolled, but they are entitled to submit a dissertation.

TO TEST FOR AUTHENTICITY: Translucent globe icons *MUST* be visible from both sides when held to a light source. The face of the transcript is printed on light brown SCRIP-SAFE® paper bordered in orange on four sides with the name of the institution appearing in white type over the face of the entire document.

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February 16, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am delighted to write in support of the application of Sophie Nguyen, Harvard Law School class of 2022, for a clerkship in your chambers. Sophie is an extremely talented, engaged, and hard-working law student who will make excellent contributions to chambers and to the legal profession. I recommend her with the greatest enthusiasm.

I had the pleasure of teaching Sophie in my large, Zoom-based course on “Capital Punishment in America” in the fall of 2020. It was clear to me, even teaching remotely, that Sophie was extremely engaged by the course material. She was always prepared to participate in class, and she came to my (again, remote) office hours several times to discuss the often frustratingly complex materials on federal habeas corpus review. Sophie’s deep engagement with the course materials paid off: she scored one of the highest scores on the (blind-graded) final exam, earning a coveted “Dean’s Scholar” prize (the equivalent of an A+). The course engages deeply with constitutional law and the law of federal habeas corpus, and there is a large amount of dense, doctrinal reading. I always test heavily on federal habeas corpus, both because I spend two solid weeks on this complicated doctrine and because it tends to separate the sheep from the goats, so to speak. Sophie demonstrated complete mastery of this difficult body of law—an accomplishment even more impressive in light of the fact that she had yet to take Federal Courts, the only other course that goes into detail on this topic (she is enrolled in that course now, in her final semester of law school). It is worth noting that my capital punishment course goes into depth with regard not only to death penalty-specific issues, but also key issues in the non-capital criminal process, such as jury selection, effective assistance of counsel, and general federal habeas standards, among others. Sophie’s careful attention to this course will prepare her well for a judicial clerkship.

Sophie’s academic transcript reflects similar engagement and mastery across the Harvard Law School curriculum, with “Honors” grades overwhelmingly predominating. I note that Sophie also received a “Dean’s Scholar” prize in Taxation, which is also a tremendously intricate doctrinal course. Sophie clearly has the raw analytical power, as well as the patience and determination, to be able master the most complex and demanding areas of law. These attributes will be extremely welcome in judicial chambers—or anywhere in the legal profession, for that matter.

Sophie’s career aspirations lean toward litigation. She has already built an impressive skill set through her coursework and extracurricular activities at law school. But a judicial clerkship will obviously be invaluable to someone with Sophie’s ambitions, adding depth and insight that she could not glean in any other way. And she will bring a great deal to any judicial chambers lucky enough to have her. Sophie is an extremely mature, conscientious, thoughtful, and amiable young woman who will get along well with all in chambers and be a terrific ambassador around the courthouse. She brings the full package of analytical power, well-developed academic skills, and softer (but no less important) personal skills. I do hope you give her application the most serious consideration.

I hope you find these comments helpful. If I can be of any further assistance, please do not hesitate to contact me by telephone at (617) 496-5457, or by email at steiker@law.harvard.edu.

Sincerely,

Carol Steiker
Henry J. Friendly Professor of Law
Harvard Law School

Carol Steiker - steiker@law.harvard.edu - 617-496-5457

February 11, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I write to recommend **Sophie Nguyen**, who has applied for a clerkship in your chambers beginning in 2023.

I know Sophie primarily as a student in my course in Federal Income Taxation last year, in which she earned one of the very top grades (a "Dean's Honor Prize" in our parlance). Her intelligence and capacity for hard work is reflected more generally in the unusually high number of Honors grades on her Harvard Law School transcript.

Sophie's personal characteristics are well illustrated by her participation in the tax class. She enrolled in the course simply because it seemed like an interesting subject. Without any relevant background, she was somewhat perplexed at first. Her reaction was to spend the time and energy to master the subject. We had many conversations in and out of class. In every case, she wanted to fully understand the matter under discussion and was willing to do whatever work was necessary to achieve that mastery.

At the moment, Sophie thinks she wants to be a litigator, so a clerkship is relevant to her professional goals. Whatever pathway she eventually chooses in the legal profession, my experience convinces me that she will be an outstanding professional.

Given her intelligence and work ethic, I am also convinced that she would be an outstanding clerk in your chambers.

Sincerely yours,

Alvin C. Warren, Jr.
Ropes & Gray Professor of Law

Alvin Warren - warren@law.harvard.edu - 617-495-3186

February 09, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

RE: Recommendation for Sophie Nguyen

I am writing to recommend Sophie Nguyen for a clerkship. I have been a Lecturer-on-Law at Harvard Law School since 2007. In addition to my teaching, I am a founder and principal of Fair Work, P.C., a Boston law firm that represents workers in individual and class action employment cases. From 2004 to 2010, I worked as a Clinical Instructor at the Legal Services Center, a clinical program of Harvard Law School. Before that, I worked for ten years as an associate and partner for a Boston law firm. As a result of my background, I have worked with, taught, and mentored a large number of law students and new attorneys.

Sophie was a student in my class during the spring of 2021. The class (Employment Law Workshop: Strategies for Social Change) focused on enforcement strategies for laws protecting workers from civil rights violations. The class, conducted in a seminar format, involved extensive discussions of course readings and weekly journal entries. Sophie participated actively in class, was consistently well prepared, and provided valuable contributions. In her weekly journal entries, she demonstrated strong analytical and written communication skills. Students in the class also were required to do a final project, which required a 15-minute presentation on a topic of their choice. Sophie's project focused on a comparative analysis of jury verdicts and settlements in sex discrimination cases in Massachusetts and California. Consistent with her excellent performance in other areas, the project was engaging and well presented. Sophie obtained a well-deserved grade of "Honors" for the class.

In addition to coursework, students were required to work in a clinical placement. Sophie worked 20 hours per week for a well-regarded private firm in Boston, Zalkind Duncan & Bernstein LLP. She obtained high marks from her supervisor, receiving "honors" ratings in every category. Some representative comments included, "Her writing is clear and well-organized," "Sophie did an excellent job identifying and researching both fact and legal research assignments given to her," and "She was proactive about seeking out interesting and challenging assignments, always had insightful contributions to make to our discussions, and was diligent about following up and completing her tasks." As with the course itself, Sophie earned a grade of "Honors" for her clinical work.

Sophie's native skills and work ethic are confirmed by her performance at HLS. She has consistently earned high marks, both in large lecture classes and in smaller seminars, reflecting her well-balanced strengths. In addition to her academic and professional achievements, Sophie is a delightful person. She got along well with her classmates, and presents in a manner that is friendly, engaged, and mature.

For these reasons, I am delighted to recommend Sophie for a clerkship. I believe she would be a welcome and valuable asset to any chambers. Please let me know if you have any questions or if I can provide any further information.

Sincerely,

Stephen S. Churchill

Steve Churchill - steve@fairworklaw.com

SOPHIE T. NGUYEN

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WRITING SAMPLE

Drafted Fall 2021

The attached is an opposition to a motion for class certification in a hypothetical case that I wrote while taking Class Actions: Litigating Advanced Topics with Professor Richard Clary in the fall of 2021. The basic facts you should be aware of before reading the memo are as follows:
The putative class members, purchasers and lessees of a fictitious car model (the ACME Green), are suing the manufacturer, ACME Company, for cheating on emissions tests and falsely advertising the Green as environmentally friendly.

Sophie Nguyen (Not Admitted to Practice)
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Attorney for Defendant ACME Company

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

ALPHA, et. al. v. ACME COMPANY

**DEFENDANT ACME COMPANY'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

CLASS ACTION

Date: Wednesday, November 17, 2021
Time: 4:15 p.m.

OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

PRELIMINARY STATEMENT

The Court should decline to certify as a class this sprawling amalgam of new-car purchasers, used-car purchasers, and lessees that encompasses consumers from states with vastly different consumer-fraud laws as well as numerous uninjured class members. Plaintiffs' proposed class consists of hundreds of persons who bought or leased an ACME Green new or used from January 1, 2016 to August 30, 2019, whether or not they still own or lease the ACME Green, whether they bought or leased the car on the internet or in one of ACME's showrooms, and even whether they saw ACME's ads or not. Plaintiffs have failed to meet their burden under Federal Rule of Civil Procedure 23(b) to (1) show that common issues predominate over individual ones, and (2) establish that a class consisting of members who bought and leased the Green in such different circumstances is sufficiently manageable and superior to other methods of adjudicating the controversy. There are also serious questions as to whether some of the proposed Class Representatives have standing to sue. Finally, Plaintiffs' proposed damages model is unworkable because it uses sampling to calculate damages in a way that fails to account for the fact that used-car sales are individually negotiated and all but assures that numerous uninjured class members will receive damages. Because of these fundamental problems with the proposed class, this Court should deny Plaintiffs' Motion for Class Certification.

I. LEGAL STANDARD

The trial court must "conduct a rigorous analysis" to determine whether a proposed class meets the requirements of Rule 23. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432. Rule 23(a) requires: (1) numerosity; (2) common questions; (3) typicality; and (4) adequacy. *See* Fed. R. Civ. P. 23(a). Because Plaintiffs seek certification under Rule 23(b)(3), they must also demonstrate both predominance and superiority. *See* Fed. R. Civ. P. 23(b)(3). The predominance

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inquiry is “far more demanding” than establishing commonality under Rule 23(a)(2). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). It requires the trial court to take a “close look at whether common questions predominate over individual ones.” *Comcast*, 133 S. Ct. at 1432 (quotations omitted). Regarding superiority, the court must consider whether a class action “is superior to other available methods for fairly and efficiently adjudicating the controversy,” including “the likely difficulties in managing a class action.” Fed. R. Civ. P. 23(b)(3)(D).

Plaintiffs, as the parties invoking federal jurisdiction, also bear the burden of establishing the existence of Article III standing and, at the pleading stage, “must clearly allege facts demonstrating each element.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (quotations omitted). Constitutional standing has three elements: the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *See id.* In a class action, the standing inquiry focuses on the Class Representatives, who must show that they have been personally injured. *In re Google Referrer Header Privacy Litigation*, 465 F. Supp. 3d 999 (N.D. Cal. 2020).

II. ARGUMENT

A. Plaintiffs cannot prove injury or damages on a classwide basis.

Plaintiffs cannot establish predominance under Rule 23(b)(3) because they cannot show that their injury is capable of common proof at trial or that damages are capable of measurement on a classwide basis. *See Comcast*, 133 S. Ct. at 1433. Despite Plaintiffs’ contention that New Jersey law should apply to the entire class, this Court’s choice-of-law rules in fact require that the law of each putative class member’s state apply to their claims. Because some states apply an objective materiality standard and others a subjective materiality or actual reliance standard, Plaintiffs will have to offer different evidence in support of different putative class members’

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claims, which means that individual questions will necessarily predominate over common ones. In addition, Plaintiffs have not proposed a uniform damages model capable of computing classwide damages: Dr. Langdell's model creates unacceptable risk that uninjured class members will receive damages and fails to account for the individual negotiation of used-car prices.

1. New Jersey choice-of-law rules require that this Court apply vastly different consumer fraud laws to the putative class members' claims.

Plaintiffs' argument that New Jersey consumer-fraud law should apply to the entire class fails to consider fully the relationship between the parties and the policies of other interested states. While Plaintiffs contend that the alleged injury was created in ACME's headquarters in Newark, not one of the five proposed Class Representatives is from New Jersey or purchased the Green in New Jersey. Because of the Class Representatives' lack of contact with New Jersey, it is implausible to characterize New Jersey as the place where the parties' relationship is centered under New Jersey choice-of-law rules. Each transaction occurred under different circumstances in different locations, and the choice-of-law analysis should account for that fact by applying the respective state laws of each class member. Applying New Jersey law to the entire class also denies other interested states the opportunity to assert their own policy choices. Each state with a subjective materiality or actual reliance standard specifically chose to implement a stricter standard than New Jersey for a reason, and this Court is not at liberty to dismiss that reason. Thus, the respective state laws of each putative class member should apply to their claims.

Given that it will have to apply 50 different state laws to the putative class members' claims, this Court cannot certify the proposed class because it fails to satisfy predominance under Rule 23(b)(3). The predominance inquiry asks whether "resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and these particular issues are more substantial than the issues subject

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only to individualized proof.” *Langan v. Johnson & Johnson Consumer Cos.*, 2018 WL 3542624, at *6 (2d. Cir. 2018). With three different standards (objective, subjective materiality, and actual reliance) in play, this Court cannot achieve resolution of the controversy “through generalized proof.” Rather, it will have to look at each class member’s claim individually to determine whether it satisfies the applicable state law. Where actual reliance is the standard, this Court will also have to examine the reason behind each class member’s purchase. *See Price v. L’Oréal*, 2018 WL 3869896, at *5 (finding that when the “basis of the bargain” conception of reliance applies, individual questions predominate because the validity of each claim depends on that person’s knowledge). As a result, individual questions will necessarily predominate over common ones and the proposed class cannot be certified under Rule 23(b)(3).

2. Dr Langdell’s model is not a viable way to calculate damages on a classwide basis.

In order to establish predominance under Rule 23(b)(3), Plaintiffs must also present a viable method of calculating damages on a classwide basis, which they have failed to do. *See Comcast*, 133 S. Ct. at 1433. Their chosen expert, Dr. Langdell, presumes to know the “true price” of an ACME Green throughout the entire period at issue and uses a sampling-based study to allocate the alleged premium attached to the Green between resellers and used-car purchasers. Dr. Langdell’s model falls far short of satisfying the Rule 23(b)(3) predominance inquiry because it impermissibly uses sampling to calculate damages for a huge segment of the class and creates an unacceptable risk that uninjured class members will receive damages as a result.

First, Dr. Langdell employs sampling not simply to calculate damages, as Plaintiffs argue, but to establish injury. Because the very heart of Plaintiffs’ claims is that ACME’s alleged misconduct caused them to pay a premium for the Green, the amount of that premium constitutes the injury. Dr. Langdell’s model, which uses a study of 50 ACME Greens to arrive at a

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“simplifying assumption” that each seller recovered 50 percent of the price premium on resale before August 20, 2019 and each buyer should recover the other 50 percent, is designed precisely to calculate the amount of premium that should be allocated to a large portion of the proposed class. Given that the existence of that premium and the Plaintiffs’ claimed injury are one and the same, Dr. Langdell’s model uses sampling to determine injury and is thus unacceptable under the Supreme Court’s decision in *Wal-Mart*. See *Wal-Mart v. Dukes*, 131 S. Ct. at 2556 (2011).

Dr. Langdell’s use of sampling is also impermissible because it creates an unacceptable risk that uninjured class members will receive damages and does not include a mechanism to winnow out such class members. Specifically, her assumption that putative class members who sold the Green before August 30, 2019 recovered 50 percent of the supposed price premium on resale ignores the possibility that some putative class members sold the Green nearly new and recovered the entire premium on resale, which would mean that they suffered no injury at all. The same is true for the used-car purchasers; some of them might have purchased the Green at such a deep discount that the alleged premium disappeared entirely. Thus, Dr. Langdell’s model creates enormous risk that uninjured class members will recover damages. While courts have recognized that a class can still be certified if it contains a de minimus number of uninjured plaintiffs (5 to 6 percent), Plaintiffs have not presented any evidence that only a few uninjured class members will recover or presented a viable way to winnow out uninjured class members. See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litigation*, CA 323 (1st Cir. 2018).

Finally, Dr. Langdell’s model cannot be a viable method of calculating damages for the entire class because it ignores the fact that used-car purchase prices are individually negotiated. Plaintiffs cannot simply eliminate very real differences among class members with a simplified damages model; they must show this Court how they plan to calculate damages for purchasers

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who negotiated their purchases individually. While Plaintiffs rely on the Supreme Court’s holding in *Tyson Foods v. Bouaphakeo*, 136 S. Ct. (2016) to argue that sampling is an acceptable way to establish liability, courts have clarified that *Tyson* only applies in the FLSA context. *See, e.g., In re: Lamictal Direct Purchaser Antitrust Litigation*, CA 291 (3d Cir. 2020) (characterizing the FLSA context as a “unique labor situation in which, often due to inadequate record keeping, a representative sample may be the only feasible way to establish liability”) (quotations omitted). Since Plaintiffs have access to records of their purchases in this case, they must present a viable way to calculate damages for individually negotiated purchases that does not rely on sampling. Because they have not done so, they have not met their burden of presenting a classwide damages model and thus should not be certified as a class under Rule 23(b)(3).

B. Plaintiffs have not shown that a class action is sufficiently manageable or “superior” to other methods of adjudicating this controversy.

The size, scope, and diversity of the proposed class also undo any contention that a class action is “superior” to other methods of adjudicating the controversy for purposes of Rule 23(b)(3). The proposed class encompasses new-car purchasers, used-car purchasers, *and* lessees from all 50 states who bought or leased the Green in different showrooms or on the internet, without regard for whether they still own or lease the Green. Some putative class members even individually negotiated their purchase prices with distributors completely unrelated to ACME. Thus, although the putative class members do have the Green in common, their similarities begin and end there. This Court will have to look at the circumstances of each class member’s purchase, the nuances of their state’s consumer-fraud law, and in some cases, even the precise reason behind their purchase or lease. The presence of so many individual issues would make a single trial fundamentally unmanageable for this Court. As a result, a class action cannot be “superior” to other methods of adjudicating this controversy and should not be used to resolve it.

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If this Court does find that Plaintiffs' claims warrant class treatment, it should certify a far narrower class than the one proposed by Plaintiffs. The broadest class that could be certified without considerable manageability and predominance issues would be one consisting of only new-car purchasers who did not resell the Green and who live in states with an objective materiality standard. Such a class would eliminate the possibility that uninjured used-car purchasers and resellers would be able to recover, as well as the need to have trials to determine whether each individual plaintiff relied on ACME's ads. Any class broader than that would have too many individual issues to resolve and thus would not satisfy the superiority requirement.

C. The proposed Class Representatives do not have standing to sue.

1. At least four of the five proposed Class Representatives lack Article III standing.

Not only are Plaintiffs unable to establish predominance or superiority under Rule 23(b)(3), but at least four of the five proposed Class Representatives also lack Article III standing to sue. To begin with, proposed Class Representatives Beta, Gamma, and Delta have not shown that they were injured by ACME's alleged misstatements. Beta received a substantial discount on his car and is not sure that he overpaid. As a result, he cannot satisfy the injury-in-fact prong of Article III standing, which requires an injury that is both "concrete and particularized." *Spokeo, Inc. v. Robins*, 578 U.S. 2 (2016). The mere possibility that Beta overpaid for the Green, without more, falls far short of establishing a "concrete" injury under *Spokeo*; uncertain or hypothetical injuries are insufficient to warrant Article III standing.

Gamma, who "loves his Green," has also only asserted a hypothetical injury. His concern that the car may have a lower resale value when he decides to sell it has not yet come to pass and he has not suggested that he was injured because he paid a premium for the Green when he originally purchased it. His asserted injury is thus entirely "conjectural [and] hypothetical," not

“actual or imminent” as is required for Article III standing. *Spokeo*, 578 U.S. at 7. Gamma also has a traceability problem because he admitted that he pays no attention to emission standards. Even if he were able to establish that he purchased the Green at a premium, he would be unable to demonstrate that his injury is fairly traceable to ACME’s alleged conduct. *See id.* at 6.

Delta cannot establish injury for purposes of Article III standing for a different reason: she has not shown that she did not recoup the alleged premium on resale. Even if she did pay a premium for the Green when she first purchased it in 2016, Plaintiffs’ theory is that a premium was baked into the price of the Green throughout the entire period at issue for both new and used cars. As a result, the person who purchased the Green from Delta presumably also paid the alleged premium, so Delta may not have suffered any injury at all because she likely recouped any premium that she originally paid. Without evidence that she still lost money as a result of the premium even after resale, her supposed injury amounts only to a “bare procedural violation, divorced from any concrete harm,” which is insufficient to establish Article III standing. *Id.* at 9.

Epsilon, who believes that “maybe his monthly lease payments should be lowered,” has a similar traceability problem to Gamma because there is no evidence in the record to suggest that he saw ACME’s ads or was influenced by ACME’s stated emissions test results in any way. Thus, even if he were able to establish that he paid a premium on his lease payments for the Green, he cannot demonstrate that his injury was fairly traceable to ACME’s alleged misconduct. He therefore also lacks Article III standing to sue along with Beta, Delta, and Gamma.

2. All five proposed Class Representatives lack class standing to sue on behalf of the used-car purchasers.

Article III standing aside, the proposed Class Representatives also lack standing in another sense: they cannot sue on behalf of the used-car purchasers. In order for the proposed Class Representatives to have class standing, they must have “essentially the same incentive to

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litigate the counterpart claims of the class members because the establishment of the named plaintiffs' claims necessarily establishes those of other class members." *Plumbers' Union v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 770 (1st Cir. 2011). The used-car purchasers' claims are different from those of the proposed Class Representatives because they individually negotiated their purchases in a market entirely separate from ACME. It is entirely conceivable that this Court will find the used-car purchasers' claims to be weaker because of this difference, and none of the proposed Class Representatives will have any incentive to litigate on behalf of the used-car purchasers because the facts underlying their claims are different. Thus, the proposed Class Representatives do not have the same incentive to litigate the "counterpart claims" of the used-car purchasers and do not have class standing to sue on their behalf.

3. Alpha lacks class standing to sue on behalf of class members who did not see ACME's ads and do not care about emission tests.

Alpha also lacks class standing because she does not have an incentive to litigate on behalf of class members who did not buy the Green because of its emission scores. While Alpha herself has presented evidence to establish that the Green's emission scores were material to her purchase decision and that she cares deeply about the environment, many of her fellow class members have indicated that emission scores are not important to them and did not factor into their purchase decisions. If this Court finds that Alpha's claim can proceed because of her ability to show reliance but that other claims without the same level of evidence cannot, Alpha will have no incentive to litigate those weaker claims on behalf of her fellow class members. She therefore lacks class standing and is ineligible to serve as a Class Representative in this case.

D. At least some of the unnamed class members lack Article III standing.

While the standing inquiry focuses primarily on the proposed Class Representatives, the Supreme Court's decision in *TransUnion LLC v. Ramirez*, CA 116 (2020) established that

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unnamed class members also need to satisfy the elements of Article III standing. At this point, we already know that Zeta, a car dealer who sold the Green to herself at cost, was not injured but remains in the class nonetheless. Under *TransUnion*, which requires unnamed class members to show that they have suffered a “concrete harm,” Zeta does not have standing and therefore cannot be part of the class. *Id.* at 121. Plaintiffs have not presented a viable way to ensure that there will not be other class members like Zeta who also lack standing, and this Court should deny class certification until they do so to ensure that it stays within the confines of Article III.

E. While Plaintiffs satisfy Rule 23(a)’s numerosity, ascertainability, and adequacy requirements, they may not satisfy the typicality and commonality requirements.

While ACME concedes that the proposed class satisfies the numerosity, ascertainability, and adequacy requirements of Rule 23(a), it does not believe that Plaintiffs have satisfied the typicality and commonality requirements. As for typicality, none of the proposed Class Representatives have an incentive to prove the claims of used-car purchasers and thus cannot be “typical” of the proposed class as a whole. Plaintiffs also cannot demonstrate commonality because their purchases were all so different; they cannot establish the “capacity of a classwide proceeding to generate *common answers* apt to drive the resolution of the litigation.” *Wal-Mart*, 131 S. Ct. at 2551 (2011). While Plaintiffs may be able to demonstrate that they share a common *question*, the standard established in *Wal-Mart* requires that they show common answers as well. Because they have not done so, they cannot satisfy Rule 23(a)’s commonality requirement.

III. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs’ request for class certification.

Dated: November 17, 2021

By: /s/ Sophie Nguyen
1585 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (714) 274-5189
Email: snguyen@jd22.law.harvard.edu

OPPOSITION TO PLAINTIFFS’ MOTION FOR CLASS CERTIFICATION

Applicant Details

First Name	Alexander
Last Name	Nowakowski
Citizenship Status	U. S. Citizen
Email Address	amn114@georgetown.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>12 Kensington Ct</div> <div>City</div> <div>Princeton</div> <div>State/Territory</div> <div>New Jersey</div> <div>Zip</div> <div>08540</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	5708147164

Applicant Education

BA/BS From	George Washington University
Date of BA/BS	May 2016
JD/LLB From	Georgetown University Law Center
	https://www.nalplawschools.org/employer_profile?FormID=961
Date of JD/LLB	May 22, 2022
Class Rank	School does not rank
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	Yes
--------------------------------------	-----

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Mayer, Michael
michael_mayer@nyed.uscourts.gov
(330) 416-1535

MacDougall, Mark
mmacdougall@akingump.com

Mathieson, Christina
cm1855@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ALEXANDER NOWAKOWSKI

12 Kensington Ct, Princeton, NJ 08540 | (570) 814-7164 | amn114@georgetown.edu

May 11, 2022

Chambers of the Hon. John D. Bates
U.S. District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.,
Washington, D.C. 20001

Dear Judge Bates:

I am writing to apply for the Fall 2024-2025 and 2024-2026 term clerkships in your chambers. I am a third-year student at the Georgetown University Law Center and upon graduation, I will be clerking in the Eastern District of Texas with the Hon. Kimberly Priest Johnson, U.S. Magistrate Judge for the 2022-2023 term. I plan to pursue a career in federal criminal litigation, ideally working as an Assistant U.S. Attorney.

During the summer and fall of 2020, I interned for Judge Kiyo A. Matsumoto's chambers and drafted approximately fifteen memorandums & orders on issues including certification of class under the FLSA, the First Step Act, and complex criminal procedure challenges in habeas petitions. In the spring and summer of 2021, I interned with the U.S. Securities and Exchange Commission's Enforcement Division with an investigative team. I aided investigations on a range of securities frauds and due to my success, I was invited to continue on for the summer term.

In fall 2021, I worked with Georgetown's Habeas Corpus Practicum to draft a prisoner's state habeas petition. This project has included intensive fact investigation of issues both on and off-the-record, culminating in a memorandum of issues related to the introduction of prior acts or wrongs evidence. Further, I wrote an academic paper tracing the history of the Excessive Bail Clause in the United States and argued that critical analysis should be placed on the commercial bail indemnification contract to ensure broad judicial discretion with significantly lower costs to indigent defendants.

Attached are my resume; transcripts from Georgetown University Law Center, London School of Economics and Political Science, and the George Washington University and a writing sample. The writing sample is a draft memorandum & order in respect to a First Step Act petition written for the chambers of Judge Matsumoto under the supervision of Mr. Michael Mayer. The following have submitted recommendations on my behalf and welcome inquiries:

Professor Mark MacDougall
Georgetown Law; Akin Gump
mmacdougall@akingump.com
(202) 887-4510

Professor Christina Mathieson
National Habeas Institute
cm1855@georgetown.edu
(202) 378-0284

Mr. Michael Mayer
Sullivan & Cromwell
michaelmayer87@gmail.com
(330) 416-1535

Thank you for your time and consideration.

Sincerely,

Alex Nowakowski

ALEXANDER NOWAKOWSKI

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EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER

Juris Doctor

GPA: 3.76

Activities: Dean's List (Fall 2020); Institute of International Economic Law Fellow

Washington, DC

Expected May 2022

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

Master of Science, with Merit, in International Political Economy

Dissertation: *The Bush and Obama Administrations in the WTO - A Comparative Study of Disputes*

London, UK

December 2017

THE GEORGE WASHINGTON UNIVERSITY

Bachelor of Arts, *summa cum laude*, in Economics & International Affairs; German Studies Minor

GPA: 3.85

Honors: Deans Honor List; Delta Phi Alpha (German National Honor Society)

Activities: GW Presidential Scholarship (2012-2016); GW UNICEF Journal Founding Editor (2015-2016)

Washington, DC

May 2016

EXPERIENCE

U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Clerk in the chambers of the Hon. Kimberly C. Priest Johnson, U.S. Magistrate Judge

Plano, TX

Sep. 2022 – Sep. 2023

U.S. SECURITIES AND EXCHANGE COMMISSION

Intern, Enforcement Division

- Supporting “pump-and-dump,” Foreign Corrupt Practices Act (FCPA), market manipulation, and insider trading investigations through document review, analysis, preparation of questions for witness testimony, and legal research

Washington, DC

Jan. 2021-Aug. 2021

U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Judicial Internship in the chambers of the Hon. Kijo A. Matsumoto

- Drafting decisions on *habeas corpus* petitions to vacate or amend judgment
- Researching sentencing enhancement application and drafting First Step Act memorandum & order
- Drafting memorandum & orders for civil law cases including social security appeals, motions to dismiss, patent infringement, Fair Labor Standards Act, and labor disputes

New York, NY

May 2020 – Dec. 2020

UBS

Global Equity Derivatives Compliance Officer

- Provided business-aligned compliance advisory to Derivative and Structured Product desks, and draft policy regarding Marijuana Related Businesses, complex trades, risk management, and regulatory change

New York, NY

Feb. 2019 – June 2019

Group Risk Control Analyst, Graduate Rotational Training Program

- Investor Corporate Solutions Compliance*: Reviewed compliance and operational risk across trading within the investment bank, with a specific product focus of cash equities and derivatives
- Financial Crime Compliance*: Strategic management and analysis of relevant regulation for changes within the bank secrecy anti-money laundering program across the investment bank and Wealth Management
- Leveraged Finance Credit Risk*: Performed credit analysis for leveraged financing origination within the Group Industrials & Consumer Products portfolio to provide challenge that ensures the investment bank remains within its risk appetite

Aug. 2017 – Feb. 2019

THE U.S. DEPARTMENT OF STATE

Bureau of European and Eurasian Affairs, Southern Europe Office Internship

- Worked with Foreign Service Officers on Economic Portfolio of Turkey, Greece, and Cyprus including international trade promotion, Cyprus negotiations, environmental issues, and energy infrastructure development

Washington, DC

March 2016 – June 2016

THE WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS

Scholar Research Assistant Internship

- Researched International Trade issues with a focus on the Transatlantic Trade and Investment Partnership

Washington, DC

Aug. 2015 – Dec. 2015

FREEDOM HOUSE

Executive Office Internship

- Drafted memorandum and articles with the President of Freedom House on economics and human rights

Washington, DC

June 2015 – Aug. 2015

CLEARANCES, LANGUAGES AND INTERESTS

Clearance and Languages: Secret (2016); German (Business Proficiency)

Interests: Kayaking; Tennis; Studied Continental Philosophy and German Literature; Film studies

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Alexander Maciej Nowakowski
GUID: 818841441

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2019 -----							
LAWJ	001	91	Civil Procedure	4.00	B+	13.32	
			Charles Abernathy				
LAWJ	004	13	Constitutional Law I: The Federal System	3.00	B	9.00	
			Susan Bloch				
LAWJ	005	13	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			EunHee Han				
LAWJ	008	91	Torts	4.00	B+	13.32	
			Girardeau Spann				
			EHrs QHrs QPts GPA				
Current			11.00 11.00 35.64 3.24				
Cumulative			11.00 11.00 35.64 3.24				
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2020 -----							
LAWJ	002	12	Contracts	4.00	P	0.00	
			Michael Diamond				
LAWJ	003	91	Criminal Justice	4.00	P	0.00	
			Paul Butler				
LAWJ	005	13	Legal Practice: Writing and Analysis	4.00	P	0.00	
			EunHee Han				
LAWJ	007	91	Property	4.00	P	0.00	
			Michael Gottesman				
LAWJ	1323	50	International Law, National Security, and Human Rights	3.00	P	0.00	
			Milton Regan				
LAWJ	611	13	Questioning Witnesses In and Out of Court	1.00	P	0.00	
			Michael Williams				
Mandatory P/F for Spring 2020 due to COVID19							
			EHrs QHrs QPts GPA				
Current			20.00 0.00 0.00 0.00				
Annual			29.00 11.00 35.64 3.24				
Cumulative			31.00 11.00 35.64 3.24				

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2020 -----							
LAWJ	1067	05	English Legal History Sem	3.00	A	12.00	
			James Oldham				
LAWJ	1085	05	Sentencing Law and Policy	2.00	A	8.00	
			Mark MacDougall				
LAWJ	121	01	Corporations	4.00	A-	14.68	
			Michael Diamond				
LAWJ	1491	03	Externship I Seminar (J.D. Externship Program)		NG		
			Alexander White				
LAWJ	1491	125	~Seminar	1.00	A	4.00	
			Alexander White				
LAWJ	1491	127	~Fieldwork 3cr	3.00	P	0.00	
			Alexander White				
LAWJ	1654	08	The IMF and the Evolution of International Financial and Monetary Law	3.00	A-	11.01	
			Sean Hagan				
Dean's List Fall 2020							
			EHrs QHrs QPts GPA				
Current			16.00 13.00 49.69 3.82				
Cumulative			47.00 24.00 85.33 3.56				
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2021 -----							
LAWJ	1191	08	Sovereign Debt and Financial Stability Seminar	2.00	A	8.00	
			Anna Gelpert				
LAWJ	1492	17	Externship II Seminar (J.D. Externship Program)		NG		
			Joanne Chan				
LAWJ	1492	86	~Seminar	1.00	A	4.00	
			Joanne Chan				
LAWJ	1492	88	~Fieldwork 3cr	3.00	P	0.00	
			Joanne Chan				
LAWJ	165	05	Evidence	4.00	P	0.00	
			Paul Rothstein				
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	
			Jeffrey Shulman				
LAWJ	361	01	Professional Responsibility: The American Legal Profession in the 21st Century: Tech, Markets, & Reg	2.00	A-	7.34	
			Tanina Rostain				
			EHrs QHrs QPts GPA				
Current			16.00 9.00 34.02 3.78				
Annual			32.00 22.00 83.71 3.81				
Cumulative			63.00 33.00 119.35 3.62				

-----Continued on Next Page-----

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Alexander Maciej Nowakowski
GUID: 818841441

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2021 -----							
LAWJ	1167	05	Anatomy of a Federal Criminal Trial: The Prosecution and Defense Perspective	2.00	A	8.00	
			Jonathan Lopez				
LAWJ	1527	05	Habeas Corpus Post Conviction Practicum	5.00	A+	21.65	
			Christina Mathieson				
LAWJ	196	05	Free Press	2.00	A	8.00	
			Seth Berlin				
LAWJ	410	05	State and Local Government Law	3.00	A	12.00	
			Sheila Foster				
				EHrs	QHrs	QPts	GPA
Current				12.00	12.00	49.65	4.14
Cumulative				75.00	45.00	169.00	3.76
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2022 -----							
In Progress:							
LAWJ	1712	09	Advanced Evidence Seminar	2.00	In Progress		
LAWJ	1756	05	Criminal Law Theory in Context	2.00	In Progress		
LAWJ	178	05	Federal Courts and the Federal System	3.00	In Progress		
LAWJ	455	97	Federal White Collar Crime	3.00	In Progress		
----- Transcript Totals -----							
				EHrs	QHrs	QPts	GPA
Current							
Annual				12.00	12.00	49.65	4.14
Cumulative				75.00	45.00	169.00	3.76
----- End of Juris Doctor Record -----							

THE GEORGE WASHINGTON UNIVERSITY

OFFICE OF THE REGISTRAR

WASHINGTON, DC

Gwid : G40653461

Date of Birth: 01-MAR

Date Issued: 16-SEP-2016

Record of: Alexander Maciej Nowakowski

Page: 1

Student Level: Undergraduate

Issued To: Alexander M. Nowakowski

Admit Term: Fall 2012

12 Kensington CT

Princeton, NJ 08550

Current College(s): Elliott Schl of Intl Affairs

Current Major(s): International Affairs

Economics

Current Minor(s): German Language & Literature

Concentration(s): International Economics

Europe and Eurasia

Degree Awarded: Bachelor of Arts 15-MAY-2016

summa cum laude

Major: International Affairs

Major: Economics

Minor: German Language & Literature

Area of Concentration: International Economics

Area of Concentration: Europe and Eurasia

SUBJ NO COURSE TITLE CRDT GRD PTS

NON-GW HISTORY:

2011-2012 Advanced Placement Exam Credit

GEOG 1001 Intro To Human Geography 3.00 TR

HIST 1120 European Civ In World Context 3.00 TR

Transfer Hrs: 6.00

FALL 2014 Vienna Univ of Econ & Bus Adm

ECON 2182 International Macroeconomics 2.00 TR

ECON 3098 European Law And Economics 3.00 TR

GER 2111 German Business Communication 3.00 TR

IAFF 3188 Doing Business Arab World 3.00 TR

IBUS 4900 Energy Economics 3.00 TR

Transfer Hrs: 14.00

Fall 2015 Rutgers University-Camden

ECON 2123 Introduction To Econometrics 3.00 TR

Transfer Hrs: 3.00

Total Transfer Hrs: 23.00

GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2012

Elliott Schl of Intl Affairs

International Affairs

ECON 1011 Principles Of Economics 3.00 B+ 9.90

FILM 2153 History Of World Cinema I 3.00 A 12.00

GER 1003 Second-Year German 4.00 A 16.00

HIST 2340 Us Diplomatic History 3.00 A 12.00

PSC 1001 Intro To Comparative Politics 3.00 A 12.00

Ehrs 16.00 GPA-Hrs 16.00 Pts 61.90 GPA 3.87

CUM 16.00 GPA-Hrs 16.00 Pts 61.90 GPA 3.87

Good Standing

Dean's List

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO COURSE TITLE CRDT GRD PTS

Spring 2013

Elliott Schl of Intl Affairs

International Affairs

ECON 1012 Principles Of Economics 3.00 A- 11.10

GER 1004 Second-Year German 4.00 A 16.00

HIST 1011 World History, 1500-Present 3.00 A 12.00

IAFF 1005 Intro-Intl Affrs:Wash Perspect 4.00 A 16.00

UW 1020 University Writing 4.00 A 16.00

Ehrs 18.00 GPA-Hrs 18.00 Pts 71.10 GPA 3.95

CUM 34.00 GPA-Hrs 34.00 Pts 133.00 GPA 3.91

Good Standing

Dean's List

Fall 2013

GER 2009 Intermediate German 3.00 A 12.00

PHIL 1051 Introduction To Philosophy 3.00 A 12.00

PSC 2331 Politics Of Russia, C/E Europe 3.00 A 12.00

PSC 2482 African International Politics 3.00 A- 11.10

STAT 1111 Business & Economic Stat I 3.00 B 9.00

Ehrs 15.00 GPA-Hrs 15.00 Pts 56.10 GPA 3.74

CUM 49.00 GPA-Hrs 49.00 Pts 189.10 GPA 3.86

Good Standing

Spring 2014

Elliott Schl of Intl Affairs

International Affairs

Economics

German Language & Literature

International Economics

Europe and Eurasia

GEOG 3120 World Regional Geography 3.00 A- 11.10

GER 2010 Intermediate German 3.00 A 12.00

IAFF 2040 Gametheory&Strategicth Inking 3.00 A- 11.10

MATH 1252 Calculus-Social & Mgt Sciences 3.00 B 9.00

PHIL 3152 Theory Of Knowledge 3.00 B+ 9.90

Ehrs 15.00 GPA-Hrs 15.00 Pts 53.10 GPA 3.54

CUM 64.00 GPA-Hrs 64.00 Pts 242.20 GPA 3.78

Good Standing

***** CONTINUED ON PAGE 2 *****

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

Gwid : G40653461

Date of Birth: 01-MAR

Date Issued: 16-SEP-2016

Record of: Alexander Maciej Nowakowski

Page: 2

SUBJ NO COURSE TITLE CRDT GRD PTS

Fall 2014

Elliott Schl of Intl Affairs
International Affairs
International Economics
Europe and Eurasia
EXCH 0006 Undergraduate Study 15.00 SB 0.00
Abroad
Ehrs 0.00 GPA-Hrs 0.00 Pts 0.00 GPA 0.00
CUM 64.00 GPA-Hrs 64.00 Pts 242.20 GPA 3.78
Good Standing

Spring 2015

Elliott Schl of Intl Affairs
International Affairs
Economics
German Language & Literature
International Economics
Europe and Eurasia
ECON 2121 Financial Economics 3.00 A 12.00
ECON 2181 Intl. Trade: Theory And 3.00 A 12.00
Policy
GER 2162 German Culture & Lit In 3.00 A 12.00
English
IAFF 2190W Turkey And Its Neighbors 3.00 A 12.00
PSC 2444 Public International Law 3.00 A 12.00
Ehrs 15.00 GPA-Hrs 15.00 Pts 60.00 GPA 4.00
CUM 79.00 GPA-Hrs 79.00 Pts 302.20 GPA 3.83
Good Standing
Dean's List

Summer 2015

IAFF 3195 Internship 0.00 P 0.00
Ehrs 0.00 GPA-Hrs 0.00 Pts 0.00 GPA 0.00
CUM 79.00 GPA-Hrs 79.00 Pts 302.20 GPA 3.83

Fall 2015

BISC 1005 Biology Of Nutrition & 3.00 A 12.00
Health
ECON 2101 Intermed Microeconomic 3.00 A 12.00
Theory
ECON 2102 Intermed Macroeconomic 3.00 A- 11.10
Theory
GER 2091 Intro To German Lit-In 3.00 A 12.00
English
IAFF 3195 Internship 0.00 P 0.00
Ehrs 12.00 GPA-Hrs 12.00 Pts 47.10 GPA 3.93
CUM 91.00 GPA-Hrs 91.00 Pts 349.30 GPA 3.84
Good Standing
Dean's List

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO COURSE TITLE CRDT GRD PTS

Spring 2016

ECON 2136 Natural 3.00 A- 11.10
Resources/Environ Econ
ECON 4198W Proseminar In Economics 3.00 A 12.00
GER 2092 Intro To German Lit-In 3.00 A 12.00
English
IAFF 3180 Globalization & Natl' 3.00 A 12.00
Security
Ehrs 12.00 GPA-Hrs 12.00 Pts 47.10 GPA 3.93
CUM 103.00 GPA-Hrs 103.00 Pts 396.40 GPA 3.85
Good Standing
Dean's List

***** TRANSCRIPT TOTALS *****

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	103.00	103.00	396.40	3.85
TOTAL NON-GW HOURS	23.00	0.00	0.00	0.00
OVERALL	126.00	103.00	396.40	3.85

***** END OF DOCUMENT *****

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UNIVERSITY REGISTRAR



THE LONDON SCHOOL
OF ECONOMICS AND
POLITICAL SCIENCE ■

ACADEMIC TRANSCRIPT

Name: **Alexander Macley NOWAKOWSKI**

Date of Birth: **01 March 1994**

LSE ID No: **201626112**

UK Higher Education ID No: **1611370117608**

The above named was a student at the London School of Economics and Political Science and followed a programme which is 1 year in length when studied in full-time mode.

Programme: **MSc in International Political Economy**

Start Date: **22 September 2016**

Completion Date: **21 September 2017**

Language of
institution: **English**

Award: **MSc in International Political Economy**

Awarding Body: **London School of Economics and Political Science**

Class: **Merit**

Official Date of Award: **09 November 2017**

Session	Course	Title	Level	Value	Mark	Grade
2016/7	IR499	Dissertation	V	1	67	M
2016/7	MY4M2	Foundations of Social Research 2	V	1	59	P
2016/7	IR469	Politics of Money in the World Economy	V	0.5	72	DI
2016/7	IR455	Economic Diplomacy	V	0.5	69	M
2016/7	IR470	International Political Economy	V	0.5	67	M
2016/7	IR468	The Political Economy of Trade	V	0.5	61	M

Mark Thomson
Academic Registrar



Issued and signed on: 28 November 2017

Guide to course levels and grading:

Each course has been assigned to a level of postgraduate study as follows:

Level	Explanation
IV	Diploma
V	Masters degree

The examiners for each course will determine a grade for each candidate as follows:

Level IV

Mark	Grade	Classification
70-100	DI	Distinction
60-69	M	Merit
40-59	P	Pass
0-39	F or CF	Fail or Condoned Fail
0	AB	Absent
0	I	Incomplete
-	NA	Not assessed this year

Level V

Mark	Grade	Classification
70-100	DI	Distinction
60-69	M	Merit
50-59	P	Pass
0-49	F or CF	Fail or Condoned Fail
0	AB	Absent
0	I	Incomplete
-	NA	Not assessed this year

The distribution of grades for a number of programmes prior to 2007/8 differed to the above guide. Further information is available online at: lse.ac.uk/Transcripts.

Notes:

Information about individual programmes can be found in the School's Calendars. Calendars can be accessed online at lse.ac.uk/Calendar.

Please note that the School does not calculate students' GPA average and is unable to provide related information.

This transcript is valid only when accessed electronically via the Digitary portal or when stamped and signed on behalf of the Academic Registrar and printed on LSE-headed paper. For any queries on this transcript, including to check its validity, please email registry@lse.ac.uk, attaching the student's written consent in accordance with the Data Protection Act (1998).

Last updated: October 2013

May 11, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing to offer my highest recommendation in support of Alex Nowakowski's application for a judicial clerkship in your chambers. Alex worked as an intern for approximately seven months under my supervision in the chambers of Judge Kiyo Matsumoto in the Eastern District of New York. During that time, he demonstrated both the legal skill and temperament that would be required of an outstanding district court law clerk.

In Judge Matsumoto's chambers, we typically assign our interns the first drafts of opinions in social security appeals and habeas cases, but Alex quickly demonstrated the ability to work on more challenging cases. My co-clerks and I asked Alex to complete first drafts that were often some of our most difficult, including:

- An opinion to resolve a motion to de-certify a class and a cross-motion to amend the complaint in an FLSA case, shortly after the Second Circuit issued a decision clarifying the meaning of "similarly situated" plaintiffs, which required a novel analysis for purposes of the opinion;
- Findings of fact in a contract dispute with a lengthy procedural history; and
- Several opinions resolving unique habeas petitions, including ones brought by counsel, or by federal defendants pursuant to 28 U.S.C. § 2255.

Alex's most impressive work may have been a draft to resolve a First Step Act motion, in which a federal defendant sought a sentence reduction on several counts of conviction. The defendant was eligible for a sentence reduction on certain of his convictions, but the Second Circuit had not yet addressed whether his other convictions were eligible. Alex performed diligent research, and identified cases on point that the parties had not cited. Alex's draft grappled with all of the issues in a thoughtful way, and he turned in a polished first draft.

Alex's excellent work resulted in our decision to invite him to continue his internship through the fall of 2020, after he was initially hired for only the summer. He was an invaluable member of Judge Matsumoto's chambers, and I believe that he would be an outstanding law clerk.

Please let me know if I can provide any further information. Until April 30, 2021, I can be reached at (718) 613-2188 or michael_mayer@nyed.uscourts.gov. After that date, I can be reached at (330) 416-1535 or michaelmayer87@gmail.com.

Sincerely,

Michael Mayer

Michael Mayer - michael_mayer@nyed.uscourts.gov - (330) 416-1535

May 11, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing in support of the application of Alexander Nowakowski for a federal judicial clerkship following his graduation from the Georgetown University Law Center in May 2022.

My acquaintance with Alex came about through his participation in the Sentencing Law and Policy course that I teach as an adjunct professor at Georgetown. Alex was one of the most active and articulate participants in a class of thirty students. I really cannot add any color commentary to his strong record of academic success as an undergraduate, during his studies at the London School of Economics, and as a law student. Moreover, his work experiences – including with the Department of State, the Securities and Exchange Commission and a major multinational bank – reflect a seriousness of purpose that sets him apart from many of his contemporaries.

One thing that I have learned as a trial lawyer is to deliver any significant message in no more than three parts. With that lesson in mind, the following are the most important considerations that I believe make Alex a strong candidate for a federal judicial clerkship.

First, federal sentencing could be fairly characterized as one of the most arcane subject areas in criminal law – particularly for students who have yet to try their first case. Alex was consistently the most prepared student in class, which reflected an extraordinary level of diligence in his studies. Alex is a fine scholar, an articulate advocate for an always well-considered viewpoint, and will soon be an excellent lawyer in every respect.

A second consideration arises out of the pandemic and the universal use of video technology by Georgetown through the entire fall semester of 2020. One result of this unhappy time in recent history is that I have never personally met Alex or any of his classmates and most of them have never met each other. So the usual dynamics of law school teaching were lost and many students (perhaps understandably) chose to take a minimalist approach to their work in the classroom. Alex clearly recognized the need for leadership in that circumstance and distinguished himself by frequently taking on the difficult task of initiating and sometimes reviving discussions among a class of thirty disembodied students on a video screen.

Finally, I think law school drives to the surface the real personalities of students as well as teachers. If there is any truth to that notion, Alex will be an excellent colleague in all respects – for his judge, other clerks and courthouse staff alike. Inside and outside of the classroom, Alex is serious and respectful of all points of view while maintaining a fine sense of humor and a consistently pleasant disposition.

So I can recommend Alex Nowakowski to you in the strongest terms for consideration as a judicial clerk. I will be happy to respond to any further inquiries regarding his candidacy.

Sincerely,

Mark J. MacDougall

Mark MacDougall - mmacdougall@akingump.com

May 11, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I write to enthusiastically recommend that you consider Alexander Nowakowski for a clerkship. I had the privilege of teaching Alex in the Habeas Corpus Post-Conviction Practicum at Georgetown University Law Center during the Fall 2021. He immediately stood out as bright, insightful, curious, and compassionate.

Last fall, the Habeas Corpus Post Conviction Practicum consisted of two parts: (1) a weekly seminar in which students were expected to participate in discussions regarding relevant issues; and (2) a four-person team project in which the team represented a real client. Alex's team represented a client who had been convicted and sentenced to life in Georgia for the murder of a prostitute. The client was black, deaf, and merely visiting the Atlanta area as a New York resident when he was arrested.

Alex drafted several thorough, well-researched memoranda of law for the case regarding trial counsel's failure to object to evidence of prior bad acts. Alex first identified the issue on his own after reviewing the trial transcript. He was so troubled by defense counsel's egregious failure to object that he led the team in investigating evidence to support a claim that defense counsel was constitutionally ineffective. The investigation included reviewing police reports and interviewing lay witnesses who provided compelling vignettes that shed light on the truth behind the situation.

In addition to the multiple legal memoranda that Alex drafted about the prior bad acts and defense counsel's ineffectiveness and the investigation, Alex also drafted an argument in support of a hypothetical case involving a petition for habeas relief in the federal courts. Each student in the class was expected to grapple with issues of procedural default and how to present a claim under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254. Alex's argument that the claim was not procedurally defaulted was nuanced and demonstrated a legal understanding well beyond his age and experience. It exceeded strong legal arguments we have reviewed from our experienced capital defender colleagues. Quite frankly, my co-professor and I were blown away.

The typical clerk characteristics of attention to detail and outstanding writing skills certainly apply to Alex. Alex also brings curiosity, compassion, and brilliant legal understanding. He is perfectly suited for a clerkship, and I cannot recommend him highly enough. Please feel free to contact me directly at cmathieson@habeasinstitute.org if you have any questions.

Thank you,

Christina Mathieson

P.O. Box 4268 Silver Spring MD 20914

202.378.0284

www.habeasinstitute.org

Christina Mathieson - cm1855@georgetown.edu

Alexander Nowakowski
12 Kensington Ct, Princeton, NJ 08540
(570) 814-7164; amn114@georgetown.edu

Writing Sample

The attached writing sample is an excerpted Memorandum & Order in response to a First Step Act motion for a prisoner in federal custody within the Eastern District of New York. The defendant sought a sentence reduction for his narcotics distribution conspiracy conviction, and critically, his murder in the aid of racketeering conviction. The analysis below considers the defendant's eligibility for a sentence reduction under the First Step Act. This draft is solely my unedited work product. Judge Kiyo A. Matsumoto's chambers has granted permission for this draft to be used as a writing sample.

Legal Standard

The United States Sentencing Commission issued four reports to Congress explaining that the ratio of 100 to 1 for crack-to-powder was too high and unjustified because sentences embodying this ratio "could not achieve the Sentencing Reform Act's 'uniformity' goal of treating like offenders alike, because they could not achieve the 'proportionality' goal of treating different offenders . . . differently, and because the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race based differences." *Dorsey v. United States*, 567 U.S. 260, 268 (2012) (citing *Kimbrough v. United States*, 552 U.S. 85, 97-98 (2007)). In response, Congress enacted the Fair Sentencing Act into law increasing "the drug amounts triggering mandatory minimums for crack trafficking offense from 5 grams to 28 grams in respect to the 5-year minimum and from 50 grams to 280 grams in respect to the

10-year minimum (while leaving powder at 500 grams and 5,000 grams respectively.)” *Id.* at 269.

“The First Step Act of 2018 ‘made retroactive the crack cocaine minimums in the Fair Sentencing Act.’” *United States v. Williams*, No. 03-CR-1334 (JPO), 2019 WL 2865226, at *2 (S.D.N.Y. July 3, 2019) (quoting *United states v. Rose*, No. 03-CR-1501, 2019 WL 2314479, at *2 (S.D.N.Y. May 24, 2019)). Section 404(b) of the First Step Act of 2018 states that “[a] court that imposed a sentence for a covered offense may, on motion of the defendant . . . impose a reduced sentence as if section 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed.” Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018); see also *United States v. Holloway*, 956 F.3d 660, 664 (2d Cir. 2020). A “covered offense” is defined as “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.” *Id.* § 404(a).

Further, “[r]elief under the First Step Act is discretionary,” though “Section 404(c) places two limits on the court’s resentencing power.” *United States v. Simmons*, 375 F. Supp. 3d 379, 386 (E.D.N.Y. 2019). Section 404(c) states:

LIMITATIONS.- No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.

Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222 (2018).

In reviewing a motion for relief pursuant to the First Step Act, the court must first consider whether the defendant is eligible for a reduction in sentence and, if eligible, consider if such relief is warranted under the particular circumstances of the case “consider[ing] all the applicable factors under 18 U.S.C. § 3553(a), as well as defendant's post-sentencing conduct while in prison.” *United States v. Williams*, No. 03-CR-795 (SJF), 2019 WL 3842597, at *4 (E.D.N.Y. Aug. 15, 2019) (collecting cases). “[T]he Second Circuit has cautioned that ‘many defendants who are eligible for Section 404 relief may receive no substantial relief at all’ [because] ‘Section 404 relief is discretionary, after all, and a district judge may exercise that discretion and deny relief where appropriate.’” *United States v. Aller*, -- F. Supp. 3d --, 2020 WL 5494622 (S.D.N.Y. Sept. 11, 2020) (quoting *United States v. Johnson*, 961 F.3d at 191).

Discussion

Defendant moves for a modification of his sentence pursuant to the First Step Act regarding his conviction for engaging in narcotics distribution conspiracy, Count Forty-Seven; and murder in aid of racketeering, Count Eight. (See *generally* Mem.) The parties agree that defendant is eligible for a modification of his sentence regarding Count Forty-Seven, however the government opposes a sentence reduction regarding defendant's conviction for murder in aid of racketeering.

I. Eligibility

First, there is no question that defendant's narcotics distribution conspiracy conviction is a covered offense. The government "agrees that [defendant's] narcotics distribution conspiracy conviction is a 'covered offense' under the First Step Act . . . [b]ecause the statutory penalties for Section 841(b)(1)(A) [charged under Count Forty-Seven] were modified by Section Three of the Fair Sentencing Act" (Opp. at 5.) In finding that narcotics distribution conspiracy was a "'covered offense' within the meaning of Section 404(a)," the Second Circuit explained that "Section 2 of the Fair Sentencing Act modified the statutory penalties associated with a violation of those provisions by increasing Section 841(b)(1)(A)(iii)'s quantity threshold from 50 to 280 grams" and, "Section 2 thus modified - in the past tense - the penalties for [defendant's]

statutory offense” *United States v. Johnson*, 961 F.3d 181, 190-91 (2d Cir. 2020); see also *United States v. Martin*, 974 F.3d 124, 133 (2d Cir. 2020); *United States v. Burrell*, No. 97 CR 988-1 (RJD), 2020 WL 5014783, at *4 (E.D.N.Y. Aug. 25, 2020).

As defendant is unquestionably eligible for relief regarding his narcotics distribution conspiracy conviction, the court turns to defendant’s murder in the aid of racketeering conviction. Here, the government sets forth its main challenge to defendant’s First Step Act relief by stating “there is no legal or factual basis that warrants resentencing” as “[m]urder is not a covered offense.” (Opp. 5.) In support, the government cites to *United States v. Barnett*, No. 90-cr-0913(LAP, No. 19-cv-0132(LAP), 2020 WL 137162, at *4-5 (S.D.N.Y. Jan. 13, 2020),¹ and *United States v. Potts*, 389 F. Supp. 3d 352, 355-56 (E.D.Pa. 2019), to state that murder in the aid of racketeering pursuant to 18 U.S.C. § 1959(a)(1) is not a “covered offense.” (*Id.*) Defendant asserts, however, that *United States v. Jones*, No. 3:99-cr-264-6(VAB), 2019 WL 4933578,

¹ The *Barnett* district court states “that [defendant] is eligible for a sentence reduction on Count Three [possession with intent to distribute cocaine-base in violation of 21 U.S.C. § 841(b)(1)(C)] but is not eligible on Count One [conspiracy to distribute narcotics in violation of 21 U.S.C. § 846]” and that “any reduction of sentence would be purely academic because [defendant] remains subject to a life sentence on Count One.” *Barnett*, 2020 WL 137162, at *4-5. This court does not find the reasoning of *Barnett* persuasive in light of *Johnson*’s discussion of 21 U.S.C. § 846 eligibility in rejecting the government’s proposed limitations in reading the First Step Act. *Johnson*, 961 F.3d at 190 n.6.

(D. Conn. Oct. 7, 2019), and *United States v. Powell*, No.3:99-cr-264-18(VAB), 2019 WL 4889112, (D. Conn. 2019), provide for eligibility as the “individual life sentences for Racketeering and crack cocaine distribution . . . flowed from a single offense level and a single sentence guideline determination.” (Mem. 16.)

In *United States v. Powell*, the defendant had been convicted of racketeering offenses, conspiracy to distribute cocaine base, obstruction of justice and witness tampering, and conspiracy to commit money laundering. 2019 WL 4889112, at *1. The *Powell* court found that because the defendant had been convicted of a “covered offense,” the narcotics distribution conspiracy in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and 846, that the defendant was eligible for resentencing of his entire sentence because the racketeering offenses are “premised on violations of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A).” *Id.* at 5. The *Powell* court further stated that the “RICO, RICO Conspiracy, obstruction of justice and witness tampering, and conspiracy to commit money laundering convictions thus were all addressed together, with the crack cocaine violation, as part of a single sentencing package, as inextricably related offenses.” *Id.* at *8. (citing *United States v. Triestman*, 178 F.3d 624, 630 (2d Cir. 1999)). Under the same logic, the *Powell* court found that the defendant in *United States v. Jones*, who had been convicted

of racketeering offenses and conspiracy to distribute to heroin and cocaine base in violation, was eligible for First Step Act relief. 2019 WL 4933578, at *4-5.

One court in the Eastern District of Michigan has characterized the *Powell* court's reasoning as the "one qualifies all" approach and has rejected its conclusions because a "bedrock principle of post-conviction procedure is that 'a district court may modify a defendant's sentence only as provided by statute.'" *United States v. Smith*, No. 04-90857, 2020 WL 3790370, at *10 (E.D. Mich. July 7, 2020) (quoting *United States v. Johnson*, 564 F.3d 419, 421 (6th Cir. 2009)) (brackets omitted). "Plainly, [Section 404(b)] indicates that the Court may only impose reduced sentence for a covered offense" and "[a]t the very least, Sec.404(b) does not *expressly permit* the Court reduce a sentence for a non-covered offense" while in contravention of "well-defined limits" placed on the power of a district court to modify a sentence "*Powell* assumed the court could reduce a sentence for a covered offense because Sec.404(b) did not *expressly prohibit* such a reduction." *Id.* (emphasis in original). Therefore, the *Smith* court found that the defendant was eligible and deserving of relief for the "covered offenses," but that the "First Step Act does not allow sentence reductions for non-covered offenses, such as [defendant's] continuing criminal enterprise conviction under §

848(a)” because, *inter alia*, the First Step Act must be read in conjunction with 18 U.S.C § 3582(c)(1)(B). *Id.* at *13.

While not cited by the parties, this court finds a recent decision within the Eastern District of New York taking issue with *Smith’s* conclusion that the continuing criminal enterprise conviction (“CCE”) was not a covered offense to be persuasive to the extent that it provides the appropriate approach for considering eligibility. In *United States v. Burrell*, the defendant had been convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(a) and moved pursuant to § 404 for First Step Act relief. 2020 WL 5014783, at *1. In *Johnson*, the Second Circuit explained that “it is the statute under which a defendant was convicted, not the defendant’s actual conduct, that determine whether a defendant was sentenced for a ‘covered offense’ within the meaning of Section 404(a).” 961 F.3d at 187. In light of the Second Circuit’s decision in *Johnson*, the *Burrell* court reasoned that the “‘covered offense’” discussion take place entirely *at the statutory level*” and, “[i]n this respect, CCE under § 848(a) and (c) is no less incomplete, or unconsummated, in ‘describing a statutory offense’ (to borrow *Johnson’s* vocabulary) than the conspiracy statute.” *Burrell*, 2020 WL 5014783, at *7. “The ‘statutory offense’ known as CCE *can only* be fully stated by the interaction of Section 848 (a) and, in

the language of 848(c), the ‘provision’ of subchapter I or II of Title 21 that the defendant is charged with having continuously violated” and “one or more additional statutes must be part of identification of the statutory offense.” *Id.* (emphasis added).

Further, *Burell* criticizes *Smith*’s conclusion that the CCE offense was not a covered offense because it required additional elements for a conviction even though the *Smith* court recognized that the jury must have concluded that the defendant violated § 841(a)(1) and § 846.² *Id.* at *6 (citing *Smith*, 2020 WL 3790370, at *12). The *Burell* court explains that its interlocking approach recognizes both the “practical” understanding of the manner in which cases are charged while fulfilling the “eligibility-expanding” guidance from the Second Circuit in discussing the conviction of covered offenses at the statutory level as a rejection of the government’s arguments that the court should limit relief based on “actual conduct.” *Id.* at 7-8 (emphasis in original).

This solution deftly threads the needle. Rather than focusing on the underlying conduct disavowed by the Second Circuit, *Burell*’s focus on the interaction of the statutes emphasizes that the CCE conviction is incomplete without the

² While the *Smith* court rejects the “underlying criminal conduct” approach, it appears to have considered that the defendant’s enterprise dealt in both crack and powder cocaine to distinguish its reasoning from *United States v. Hall*, No. 2:93-cr-162(1), (E.D.Va. Mar. 2, 2020), in which that defendant dealt only in crack cocaine. *Smith*, 2020 WLE 3790370, at *13.

statutes that have been modified by the Fair Sentencing Act, 21 U.S.C. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and therefore any modification to these statutes' penalties modifies the CCE conviction. Therefore, unlike *Powell's* "one qualifies all" approach, *Burrell's* interlocking approach does not require consideration of any other conviction within a "sentencing package," *Powell*, 2019 WL 4889112, at *8, and determines on the statute alone if a sentence should be considered a covered offense pursuant to Section 404.³

Further, this reasoning, as opposed to the *Powell* court's "one-qualifies all" approach, is in line with the Second Circuit's recent decision in *United States v. Martin*. 974 F.3d 124 (2d Cir. 2020). In deciding if a defendant could receive a benefit for a "covered offense" already served for his subsequent convictions while in prison, the Second Circuit clarified that "[t]he explicit reference to sections 2 or 3 of the Fair Sentencing Act demonstrates that the First Step Act permits a sentencing reduction *only* to the extent that section 2 or 3 of the Fair Sentencing Act would apply" meaning that the "First Step Act permits a sentencing modification only to the extent the Fair Sentencing Act would have changed the

³ The *Burrell* court explains that "to state that relation [between CCE and the violations of a covered statutory offense] does not dispose of the objection that CCE nevertheless remains a freestanding statute with its own penalty provision and that the narcotics conspiracy is 'underlying conduct' that *Johnson* says I am not to consider." *Burrell*, 2020 WL 5014783, at *5.

defendant's 'covered offense' sentence." *Id.* at 138 (emphasis in original). "[C]ourts require specific modification authorization - either due to a change in the guidelines ranges for a sentence on a particular count of conviction, or because a statute authorizes the reduction of a sentence - for each term of imprisonment contained in an otherwise final judgment of conviction." *Id.* at 137 (emphasis in original). Thus, the *Burrell* approach allows for modification of a sentence that can only be fully stated by its interaction with a "covered offense," without improperly considering those non-covered offenses that are not each subject to "specific modification authorization." *Id.*

Defendant cites to a recent Seventh Circuit decision, *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020), that has taken the "one qualifies" all approach and made clear that a defendant is eligible for First Step Act relief for non-covered offenses if he is convicted of any covered offense. (Mem. 17.) In reading Section 404(c) of the First Step Act, the Seventh Circuit states "[i]f Congress intended the Act not to apply when a covered offense is grouped with a non-covered offense, it could have included that language."⁴ *Hudson*, 967 F.3d at 610-11.

⁴ The Seventh Circuit finds further support for its approach from two Fourth Circuit decisions - *United States v. Gravatt*, 953 F.3d 258, 264 (4th Cir. 2020), and *United States v. Venable*, 943 F.3d 187, 193 (4th Cir. 2019). See *Hudson*, 967 F.3d at 610.

However, the Second Circuit has emphasized that 3852(c) must be read in conjunction with the First Step Act, which allows only those sentence modifications that are *expressly permitted*. See *Holloway*, 956 F.3d at 666 ("But a First Step Act motion is based on the Act's own explicit statutory authorization, rather than on any action of the Sentencing Commission. For this reason, such a motion falls within the scope of § 3582(c)(1)(B), which provides that a 'court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute.'"); see also *Martin*, 974 F.3d at 135-37.

Therefore, in applying the *Burrell* approach, this court does not find that it has the authority to modify defendant's murder in the aid of racketeering conviction as it can not be read as a covered offense pursuant to Section 404.

18 U.S.C. Section 1959 states:

- (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—
 - (1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years

or for life, or a fine under this title, or both;
. . .

18 U.S.C. § 1959. Murder in the aid of racketeering does not require interaction with any covered offense “to be fully stated.” *Burrell*, 2020 WL 5014783, at *7. While dealing in controlled substances is one of the multiple crimes that may define a racketeering activity, this predicate applies to the “enterprise that engaged in racketeering activity,” e.g. the drug gang, and not the defendant convicted under the statute. 18 U.S.C. § 1959. To find that the underlying conduct of the Mora organization’s dealing of crack cocaine as an interlocking component to the murder in aid of racketeering offense does not serve the purposes the Fair Sentencing Act.

In *Johnson*, the Second Circuit discussed the government’s anxiety that “if Section 404 eligibility turns on whether a defendant was sentence for violating a certain type of ‘Federal criminal statute,’ that [it] would lead to the *improbably broad* result that any defendant sentenced for violating Section 841(a), or even the Controlled Substances Act, would be eligible, because these could be understood as ‘statutes’ whose penalties were modified by Section 2 and 3 of the Fair Sentencing Act.” 961 F.3d at 190 n.6. The Second Circuit stated that its analysis in the present case applied to

the 21 U.S.C. § 841(b)(1)(A)(iii), implying that it would not support such a broad approach. *Id.*

Thus, for the foregoing reasons, defendant is not eligible for relief pursuant to Section 404 in respect to his murder in the aid of racketeering conviction pursuant to U.S.C. § 1959(a)(1).

Applicant Details

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 Date of BA/BS **May 2012**
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 Date of JD/LLB **May 1, 2021**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Women's Rights Law Reporter**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Hunter Appellate Advocacy**

Bar Admission

Admission(s) **New Jersey**

Prior Judicial Experience

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Internships/ **Yes**
Externships
Post-graduate
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Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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March 17, 2022

The Honorable John D. Bates
United States District Court Judge
U.S. District Court for the District of Columbia
333 Constitution Avenue, Northwest
Washington, DC 20001

Dear Judge Bates,

I am a first-generation student, Rutgers law school graduate, and barred attorney in New Jersey with an application to transfer my score pending in Washington, D.C. I want to express my interest in working in your chambers upon the completion of my first judicial clerkship. I am confident my academic and professional background have provided me with experience that will aid in substantial contributions to your chambers, if selected for the position.

Currently, I serve as a Judicial Law Clerk for the Honorable Carmen Messano, the Presiding Judge of the Appellate Division in New Jersey, where I write bench memorandums exploring the legal debate in criminal, civil, and administrative appeals. I recognize the merits and drawbacks of the arguments and recommend a course of action. Because I have demonstrated I am a reputable asset, Judge Messano personally provides additional research assignments in challenging topics, such as surveying the fractured opinions throughout both state and federal law concerning evidentiary issues.

Recently, I collaborated with a team of PhD researchers from the Rutgers School of Public Affairs and Administration and Netherland's Utrecht University School of Governance, to co-develop a systematic literature review to understand the increasing developments in datafication and the relationship between data and social equity currently missing in the literature. During this two-year project, I researched the legal implications of open data through studying the data value chain, and how its impacted by the advent of technology and the pace of its ever-changing environment. After presenting those findings in various international conferences, the research has been submitted to the Public Administration Review.

Upon graduating, I was awarded the Dean's Pro Bono Publico Award for Exceptional Service and the Herb and Tricia Hinkle Award for Commitment to Educating Camden Youth about the Law, in part, for my work in the Marshall-Brennan Constitutional Law Project as a Michael Young Scholar. During law school I also participated in Hunter Moot Court, an appellate advocacy program, where I sharpened my attention to detail to create a brief that synthesized the law in a way that is effective, concise, and driven. I am confident my research and writing skills, combined with my leadership roles, will provide the ability to succeed within the District of Columbia.

This letter is accompanied by a copy of my resume, transcript, writing sample, and list of recommenders. I look forward to meeting with you in the future to discuss my interest as a Judicial Law Clerk and my qualifications. Thank you for your consideration.

Respectfully,

Rebecca Porter

Rebecca Porter

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EDUCATION:

RUTGERS LAW SCHOOL | Camden, NJ

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- Awards:** Dean's Pro Bono Publico Award for Exceptional Service, Herb and Tricia Hinkle Award for Commitment to Educating Camden Youth about the Law, Marshall-Brennan Constitutional Law Project Michael Young Scholar Award, Marshall-Brennan Constitutional Literacy Project Graduating Fellow
- Honors:** Dean's List (top 25% of the class) - Fall 2018, Fall 2019, Fall 2020, Spring 2021
- Activities:** Research Editor - *Women's Rights Law Reporter*, Hunter Moot Court (2019-20), Michael Young Fellow (Marshall Brennan Teaching Assistant 2020-2021), Marshall Brennan Fellow (2019-20), VP - The Wellness Society, Clerk - Phi Alpha Delta Law Fraternity, *Treasurer* - American Constitution Society for Law and Policy, Women's Law Caucus, Health Law Society, Assoc. for Public Interest Law, Softball
- Pro Bono:** Domestic Violence Project, Street Law, Volunteer Income Taxation Assistance (VITA), Voters' Rights Project
- Memberships:** Camden County Bar Association, Burlington County Bar Association

ELON UNIVERSITY | NC

B.A. in Professional Writing and Rhetoric, Creative Writing, cum laude, May 2016

Honors: Sigma Tau Delta International Honors Society: Xi Omicron Chapter, Dean's List, 2014- 2016

Study Abroad: Rio De Janerio and Salvador, Community Engagement, 2013

EXPERIENCE:

HONORABLE CARMEN MESSANO, P.J.A.D., N.J.S.C. | Long Branch, NJ

Judicial Law Clerk, 2021-2022

- Serve as a Judicial Law Clerk to the Presiding Judge of the Appellate Division by independently researching complex legal issues in civil, criminal, and administrative appeals and subsequently drafting a memorandum of law or draft opinion to aid in decision making
- Identify implications for emergent motion applications, and also analyze and proofread the circulating draft opinion

TRANSPARENCY AND GOVERNANCE CENTER | Newark, NJ
Rutgers School of Public Affairs and Administration

Legal & Transparency Governance Fellow, 2019-2021

- Co-develop a protocol to analyze if data, at various stages of the data value chain, including collection, storage, analyze, and use of data exacerbates issues that fall at the intersection of open government initiatives and social inequity attributable to gender, race, educational background, and income
- Conduct literature review and present findings at international conferences discussing the relationship between data as it relates to smart cities, algorithms, and big data to several forms of social equity including distributional, process, and procedural fairness

DEPARTMENT OF HOMELAND SECURITY | Philadelphia, PA

Legal Intern, 2020-2021

- Assisted in legislative matters by formulating answers, briefs, and other pleadings regarding national security, immigration, litigation, legislative and regulatory practice, international law, cybersecurity and orally presenting the legal and factual arguments in required motions and proceedings
- Provided guidance appropriate to the defense of the cases filed in the courts or administrative tribunals in conformity with applicable rules and regulations in an effort to secure the Nation in a manner that is lawful and consistent with the civil rights and liberties of our citizens and residents

EXPUNGEMENT CLINIC | Camden, NJ

Student Lawyer, 2021

- Screened clients to determine eligibility and assisted low-income clients throughout the presentation process needed to successfully expunge their records
- Evaluated the societal impacts and public policy considerations on the hardships criminal records present for individuals, including the stigmas attached to "having a record" and the loss of job and housing opportunities

HONORABLE JOSEPH A. DICKSON, U.S.M.J., D.N.J. | Trenton, NJ

Judicial Summer Intern, 2019

- Prepared bench memoranda summarizing and framing the case, explaining the facts and legal issues, and recommending a conclusion for settlement conferences and pre-trial evidentiary hearings
- Actively participated in a dynamic work environment to synthesize the laws and regulations regarding pre-trial proceedings to aid the judge, while in conference, to process the arguments made by litigants

PHREESIA | Raleigh, NC & NYC

Healthcare Information Technology Recruiter, 2017-2018 & Early Careers Recruiter, 2016-2018

- Project managed "Early Careers' Program" budget while tracking analytics, establishing career trajectories, and program initiatives for the fiscal year
- Established and executed new hiring procedures on Applicant Tracking Systems such as Greenhouse and Jobvite
- Created the foundation for the Early Careers Program on University specific hiring strategies to successful double headcount within a year, for junior, senior, and technical roles within healthcare platforms
- Developed a successful internship program in Canada acting as a liaison between five universities and Phreesia

UPSWING | Remote

Reading, Composition, and Writing Tutor, 2016-2019

- Collaborated with adult education learners, first-generation college students, and first-year students attending colleges across the nation, to create frameworks of success to positively impact retention rates
- Improved analytical skills for English as a second language students (ESL) in college reading and comprehension, writing, and citations, to impact student accomplishment

PUBLICATIONS:

Research: Systematic Data for Social Equity? A Systematic Literature Review and Research Agenda, Public Administration Review (PAR) 2021 (submitted for application)

Presenter: Perspectives on Public Management and Governance

Conference: The Public Management Research Conference (PMRC): Public Management Research Association (PMRA) University of Hawai'i at Mānoa, Honolulu Hawaii (June 23-25, 2021)

Presenter: Data Science for Policy Making in a Time of Change

Conference: International Research Society for Public Management (IRSPM): Public Management, Governance and Policy in Extraordinary Times: Challenges and Opportunities 2020, Berne, Switzerland (April 21-23 2021)

Presenter: Public Governance for Inclusive Growth: Accountability, Engagement, and Digital Transformation in a Post-Covid-19 Pandemic Era

Conference: National Institute of Development Administration (NIDA) and EROPA Secretariat Eastern Regional Organization for Public Administration (EROPA), Bangkok, Thailand (August 2-3, 2021)

Nonfiction Stories: "Flying to North Carolina and Back" Quail Bell Magazine 2017

"Aunt" Susquehanna Review 2017

Nonfiction Essay: "Why I Wear Black Clothes" Rain Party Disaster Society 2016

Poetry: "Vignette" Prairie Margins 2016

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Summer 2018 RUTGERS LAW SCHOOL									Fall 2019 RUTGERS LAW SCHOOL								
PROGRAM: LAW									PROGRAM: LAW								
DEANS LIST									DEANS LIST								
CONTRACTS	24	601	511		L1	4.0		A	WOMENS RTS LAW REPOR	23	600	574		01	0.5		PA
DEGREE CREDITS EARNED: 4.0	TERM AVG: 4.000		CUMULATIVE AVG: 4.000						PROFESS RESPONSIB	24	601	582		01	2.0		B+
									EVIDENCE	24	601	691		02	4.0		A-
									APP ADVC HUNTERMCI	24	601	702		11	3.0		A-
									MARSHALL BRENNAN FE	24	601	782		01	2.0		A
									MARSHALL BRENNAN LAB	24	601	799		01	1.0	P	PA
Fall 2018 RUTGERS LAW SCHOOL									DEGREE CREDITS EARNED: 41.5 TERM AVG: 3.668 CUMULATIVE AVG: 3.325								
PROGRAM: LAW																	
DEANS LIST																	
CIVIL PROCEDURE	24	601	501		02	4.0		B+	Spring 2020 RUTGERS LAW SCHOOL								
LAWR I	24	601	530		02	2.5		B+	PROGRAM: LAW								
TORTS	24	601	541		03	4.0		B	WOMENS RTS LAW REPOR	23	600	574		01	0.5		PA
DEGREE CREDITS EARNED: 14.5	TERM AVG: 3.205		CUMULATIVE AVG: 3.424						SEXUAL GEND ID & LAW	24	601	586		01	3.0		PA
									CRIM PRO-INVST PROCS	24	601	655		01	3.0		PA
									TRADEMARK LAW	24	601	675		01	3.0		PA
									HUNTER MOOT COURT II	24	601	703		11	2.0		PA
									MARSHALL BRENNAN FEL	24	601	784		01	3.0	P	PA
Spring 2019 RUTGERS LAW SCHOOL									DEGREE CREDITS EARNED: 56.0 TERM AVG: CUMULATIVE AVG: 3.325								
PROGRAM: LAW																	
CONSTITUTIONAL LAW	24	601	506		01	4.0		B+	COMMENTS:								
CRIMINAL LAW	24	601	516		02	4.0		C-	Rutgers Law School adopted a mandatory pass/no credit								
PROPERTY	24	601	536		02	4.0		A-	(PASS/NOCR) for all courses this term as a result of COVID-19								
LAWR II	24	601	550		02	2.5		B+	and related university transitions.								
DEGREE CREDITS EARNED: 29.0	TERM AVG: 2.966		CUMULATIVE AVG: 3.195														

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STUDENT NUMBER: 181002308

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PROGRAM: LAW									PROGRAM: LAW DEANS SCHOLAR								
ESTATES AND TRUSTS	24	601	627		HC	3.0		B+	WOMENS RTS LAW REPOR	23	600	574		01	0.5		PA
									CONST THEORY SEMINAR	23	600	712		01	2.0		A
DEGREE CREDITS EARNED: 59.0	TERM AVG: 3.330		CUMULATIVE AVG: 3.326						BUSINESS ORGS	24	601	680		11	4.0		A
									EXPUNGEMENT LAW PROJ	24	601	693		01	4.0		A
									EFFECTIVE COUNSEL	24	601	695		11	2.0		A
Fall 2020 RUTGERS LAW SCHOOL									DEGREE CREDITS EARNED: 84.0 TERM AVG: 4.000 CUMULATIVE AVG: 3.515								
PROGRAM: LAW DEANS LIST									DEGREE: JURIS DOCTOR MAY 2021 PROGRAM: LAW								
WOMENS RTS LAW REPOR	23	600	574		01	0.5		PA									
FAMILY LAW	23	600	606		02	3.0		A+									
CONST. LAW II	23	600	673		01	3.0		B									
EMPLOYMENT LAW	24	601	631		01	3.0		A									
PRACTICE EXTERNSHIP	24	601	795		01	3.0	P	PA									
DEGREE CREDITS EARNED: 71.5	TERM AVG: 3.777		CUMULATIVE AVG: 3.404						PRIZE/AWARD: FOR EXCEPTIONAL SERVICE (MAY 2021) DEAN'S PRO BONO PUBLICO AWARD (MAY 2021)								

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Rutgers, The State University of New Jersey

EXPLANATION OF GRADING SYSTEM

A. Standard (Exception: School of Law – Newark, School of Law – Camden, Livingston College, and Rutgers Business School Newark/New Brunswick (Grad))

	<u>Grade Points</u>		<u>Grade Points</u>
A - Distinguished	4.00	F - Failing	0.00
B+ - Intermediate grade	3.50	Pass - (A thru C)	
B - Good	3.00	NOCR - No credit (D & F)	
C+ - Intermediate grade	2.50	IN - Incomplete	
C - Satisfactory	2.00	PIN - Permanent incomplete	
D - Poor	1.00	TNC - Temporary no credit	

B. School of Law – Camden & Newark

	<u>Grade Points</u>		<u>Grade Points</u>
A+ - Distinguished	4.33	C - Satisfactory	2.00
A - Distinguished	4.00	C- - Intermediate grade	1.67
A- - Intermediate grade	3.67	D+ - Intermediate grade	1.33
B+ - Intermediate grade	3.33	D - Poor	1.00
B - Good	3.00	F - Failing	0.00
B- - Intermediate grade	2.67	PASS - Credit awarded	
C+ - Intermediate grade	2.33	NOCR - No credit	0.00
		IN - Incomplete	

C. School of Law – Camden (through Summer Session 2001)

	<u>Grade Points</u>		<u>Grade Points</u>
A+ - Distinguished	4.50	C+ - Intermediate grade	2.50
A - Distinguished	4.00	C - Satisfactory	2.00
B+ - Intermediate grade	3.50	D+ - Intermediate grade	1.50
B - Good	3.00	D - Poor	1.00
		F - Failing	0.00

D. Rutgers Business School Newark/New Brunswick (Grad)

	<u>Grade Points</u>		<u>Grade Points</u>
A - Distinguished	4.00	C+ - Intermediate grade	2.33
A- - Intermediate grade	3.67	C - Satisfactory	2.00
B+ - Intermediate grade	3.33	C- - Intermediate grade	1.67
B - Good	3.00	D - Poor	1.00
B- - Intermediate grade	2.67	F - Failing	0.00
		INC - Incomplete	

E. Livingston College

	<u>Grade Points</u>		<u>Grade Points</u>
A - Distinguished	4.00	D - Poor	1.00
B+ - Intermediate grade	3.50	NOCR - Failed (no credit)	0.00
B - Good	3.00	TNC - Temporary no credit	0.00
C+ - Intermediate grade	2.50	H - Honors (A)	
C - Satisfactory	2.00	CR - Credit (B & C)	
		F - Failing	0.00

F. OTHER GRADE SYMBOLS

DF - Disciplinary failure	S - Satisfactory	W - Withdrew or dropped
IN - Incomplete	TZ - Grade not submitted	WF - Withdrew failing
NG - No grade given	X - Examination not taken	U - Unsatisfactory
WP - Withdrew passing	H - Honors grade	XF - Disciplinary Failure
IP - In Progress		

CREDIT HOUR PREFIXES

E	Credits do not count toward degree
N	Noncredit course - Credits do not count toward degree
G	Undergraduate course taken for graduate credit
PN	Course undertaken on pass/no credit basis
R	Repeated course
J	Counts as degree credit but is not in the CUM GPA
K	Does not count as degree credit but is in the CUM GPA
M	Counts toward major

TERMS AND CUMULATIVE AVERAGES

$$\frac{\text{Total grade points}}{\text{Total credit hours}} = \text{Weighted average}$$

GRADE PREFIXES

R	- Re-examination permitted
T	- Term work incomplete

CREDIT HOURS

One credit is given for 800 minutes of class (lec. or rec.) or for three times this amount of laboratory time.

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– New Brunswick, ASB, Room 200L, 65 Davidson Rd, Piscataway, NJ 08854-8096, Tel: (848) 445-3220.

REGULATIONS GOVERNING USAGE of above grade symbols are determined by each school of the University. Complete explanations are found in appropriate school bulletins of the general catalog of Rutgers University.

Elon University

Office of the Registrar

Office of the Registrar
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ELON UNIVERSITY

22 Jul 2019

Page: 1 of 2

Porter, Rebecca Tyler

11/12

COURSE	COURSE TITLE	CRD	GRD	COURSE	COURSE TITLE	CRD	GRD
	Transfer Work				Summer I 2014		
THE 101	Understanding Theatre	3.00		ENG 381	Writing Internship/ELR	2.00	A
ENG ELE	Elem of Composition	3.00		Term GPA	4.000	Credit	2.00
COM 100	Intro to Media Com	3.00		Cum GPA	3.363	Credit	80.00
GST ELE	Individual in the	3.00			Summer II 2014		
SPN 121	Elem Span I	3.00		HSS 378	Sexual Orientations-LGBT Iss	4.00	A
	Transfer Credit:			Term GPA	4.000	Credit	4.00
	Quinnipiac University	15.00		Cum GPA	3.405	Credit	84.00
	Term GPA 0.000	Credit	15.00		Fall 2014		
	Cum GPA 0.000	Credit	15.00		THE 210	Technical Prod in Theatre	4.00 A-
	Transfer Work			ENG 215	Intro Professnl Wrtg Rhetoric	4.00	A
GEN ELE	Precalculus	4.00		ENG 316	Intermed Creative Wrtg/Poetry	4.00	B+
MTH 110	Intro to Stats	3.00		GST 375	Prison Nation	4.00	A-
	Transfer Credit:			ENG 415	Advanced CUPID Studio	2.00	A
	Burlington County College	7.00			Dean's List		
	Term GPA 0.000	Credit	7.00	Term GPA	3.711	Credit	18.00
	Cum GPA 0.000	Credit	22.00	Cum GPA	3.475	Credit	102.00
	Spring 2013				Winter 2015		
COM 220	Digital Media Convergence	4.00	B-	ENG 211	Style and Editing	4.00	B
GST 115	Public Speaking	2.00	A	Term GPA	3.000	Credit	4.00
REL 110	Religion in a Global Context	4.00	B	Cum GPA	3.452	Credit	106.00
GST 110	The Global Experience	4.00	A		Spring 2015		
HED 111	Contemporary Wellness Issues	2.00	A-	ENG 317	Intermed Creative Wrtg/Fiction	4.00	B+
ELN 101	Elon 101	1.00	S	ENG 319	Writing Center Workshop	4.00	A
	Term GPA 3.388	Credit	17.00	ENG 355	The Rise of the Novel	4.00	A
	Cum GPA 3.388	Credit	39.00	THE 351	Costume Design	4.00	A
	Fall 2013			ENG 499	Research in English	1.00	A
STA 288	Brazil Preparatory Seminar	1.00	A		Dean's List		
ENG 110	Writing: Argument and Inquiry	4.00	A-	Term GPA	3.835	Credit	17.00
ENS 111	Intro. to Envir. Science	3.00	B	Cum GPA	3.517	Credit	123.00
ENS 113	Intro Environmental Sci Lab	1.00	A-		Fall 2015		
THE 125	Acting for Non-Majors	4.00	B+	ENG 313	Writing, Rhet, Civic Action	4.00	A-
ENG 250	Interpretations of Literature	4.00	B+	ENG 397	SL: Writing as Inquiry	4.00	A-
	Term GPA 3.406	Credit	17.00	ENG 496	Creative Writing Sr Seminar	4.00	B+
	Cum GPA 3.397	Credit	56.00	ENG 355	High School in American Lit	4.00	A
	Winter 2014				Dean's List		
GST 288	Brazil:Community Engage't/Elr	4.00	A-	Term GPA	3.675	Credit	16.00
	Term GPA 3.700	Credit	4.00	Cum GPA	3.539	Credit	139.00
	Cum GPA 3.430	Credit	60.00		Winter 2016		
	Spring 2014			ENG 379	Literature of the Absurd	4.00	A
ENG 282	CUPID Studio	2.00	B	Term GPA	4.000	Credit	4.00
ENG 304	Understanding Rhetoric	4.00	B-	Cum GPA	3.554	Credit	143.00
ENG 213	Creative Writing	4.00	B+				
HSS 111	SL: Art/Science of Human Serv	4.00	A				
SCI 121	Science Without Borders	4.00	B-				
	Term GPA 3.156	Credit	18.00				
	Cum GPA 3.340	Credit	78.00				

Continued on next Column/Page



Rodney L. Parks, University Registrar

ELON UNIVERSITY

22 Jul 2019

Page: 2 of 2

Porter, Rebecca Tyler

11/12

COURSE	COURSE TITLE	CRD	GRD	COURSE	COURSE TITLE	CRD	GRD
Spring 2016							
ENG 497	Professional Writing Seminar	4.00	B+				
THE 301	Theatre History/Literature I	4.00	A-				
Term	GPA 3.500	Credit 8.00					
Cum	GPA 3.551	Credit 151.00					

Degree Received: Bachelor of Arts

Date Conferred.: 05/21/2016

Majors:.....: English

Minors:.....: Theatre Arts
Literature

Honors:.....: Cum Laude

End of official record.



Rodney L. Parks
Rodney L. Parks, University Registrar

Elon University

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Elon University School of Law

Office of the Law School Registrar
Room 110B
201 North Greene Street
Greensboro, NC 27401
Phone: 336-279-9330
FAX: 336-691-1059
Email: lawregistrar@elon.edu
School of Law website: law.elon.edu

History

In 1889 the N.C. General Assembly issued a charter for Elon College. In 1923 the college sustained a major fire and was rebuilt in 1923-1926. Elon College became Elon University in 2001. The Elon University chapter of Phi Beta Kappa was chartered in 2010. In 2006 Elon University School of Law enrolled its charter class at its campus located in downtown Greensboro, N.C.

Accreditation

Elon University is accredited by the Southern Association of Colleges and Schools Commission on Colleges to award bachelor, master, doctor of physical therapy, and juris doctor degrees. Contact the Commission on Colleges at 1866 Southern Lane, Decatur, GA 30033-4097 or call 404-679-4501 for questions about the accreditation of Elon University, to file a third-party comment at the time of Elon University's decennial review, or to file a complaint against Elon University for alleged non-compliance with a standard or requirement.

The university's three non-law professional schools are accredited by their respective accrediting agencies: Business, the Association to Advance Collegiate Schools of Business (AACSB International); Communications, the Accrediting Council on Education in Journalism and Mass Communications (ACEJMC); and Education, the National Council for Accreditation of Teacher Education (NCATE), and the North Carolina State Department of Education. In addition, the Doctor of Physical Therapy Program is accredited by the Commission on Accreditation in Physical Therapy Education, (CAPTE) and the Physician Assistant Studies Program is provisionally accredited by the Accreditation Review Commission on Education for the Physician Assistant, Inc. (ARC-PA). The Law School is fully accredited by the American Bar Association (ABA).

For normal inquiries about Elon University including admissions requirements, financial aid, educational programs, etc., contact Elon University at 336-278-2000.

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Calendar and Course Credit

The university calendar operates on a 4-1-4 semester cycle that includes two summer sessions. The unit of credit is the semester hour.

Professional schools each run on a unique calendar accessible on the respective individual websites.

Course Numbering

Undergraduate

100-199 First year courses
200-299 Second year courses
300-499 Third and Fourth year courses

Transfer course numbering

Prefix/1XX First year electives
Prefix/2XX Second year electives
Prefix/3XX or 4XX Third and Fourth year electives

Graduate

MBA, MEd, iMedia programs
500-599

DPT program
600-899

PA program
500-699

School of Law
500-999

Grades and Grade Points

A complete listing of grades, grade points and GPA calculation for Undergraduate, Graduate and the School of Law is available at <https://www.elon.edu/u/registrar/student-resources/grading-scales/>.

John D. Porter
University Registrar

04/14/20

Quinnipiac University
Undergraduate

Page 1

TO: Rebecca T. Porter
19 Lowbridge Passage
Medford NJ 08055

ID Number: XXXX-286
Major: Journalism

Course	Title	Grd R	Hrs Att	Hrs Cmpt	Hrs Calc	Grade Points
Transfer Term						
TRANSFER CREDIT FROM:						
Burlington County College						
MA 140	Pre-Calculus		0.00	3.00	0.00	0.00
MA 206	Stats for Beh Scie		0.00	3.00	0.00	0.00
Term 12/TT			Totals:	0.00	6.00	0.00
			Cumulative Totals:	0.00	6.00	0.00
GPA = 0.00						
GPA = 0.00						
Fall 2012						
DR 101	Understanding Thea A		3.00	3.00	3.00	12.00
EN 101	Elements of Compos B		3.00	3.00	3.00	9.00
MSS 101	Intro to Media Com A		3.00	3.00	3.00	12.00
QU 101	Individual in the A		3.00	3.00	3.00	12.00
SP 101	Elem Spanish I B		3.00	3.00	3.00	9.00
Term 12/FA			Totals:	15.00	15.00	54.00
			Cumulative Totals:	15.00	21.00	54.00
						GPA = 3.60
						GPA = 3.60
End of Transcript						

Rebecca Porter

rebeccatporter@gmail.com • (609) 922-2794

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As a Judicial Law Clerk, I prepared the attached memorandum for the panel of judges on the Appellate Division in New Jersey. To preserve confidentiality, all individual names and locations have been changed, and portions have been redacted. I have received permission from my employer to use this memorandum as a writing sample.

Background Facts

Plaintiff purchased a house and procured an insurance policy with defendant. The policy contained three conditions: the policy may not be assigned to another person or entity; the person insured must retain an insurable interest in the house; and the insured must not make any material misrepresentations. However, plaintiff transferred ownership of the house to an LLC and twice thereafter renewed the policy. After a fire occurred to plaintiff's property in 2019 and defendant learned the property was transferred to an LLC, defendant denied coverage alleging that plaintiff violated the provisions of the contract and rescinded the policy ab initio. Plaintiff contends she had a valid insurance policy and the trial court incorrectly found she was required to obtain defendant's consent to an assignment of the insurance policy because the policy was already in her name. Because the LLC was not formed until 2018, plaintiff alleges there was no misrepresentation at the time the application was completed, and the policy was issued in 2017.

DISCUSSION

I. Plaintiff's misrepresentation about ownership was material as it made her insurance policy inapplicable

First, plaintiff argues the trial court incorrectly held that defendant's rescission of the insurance policy ab initio was proper because there was no misrepresentation in the application because she transferred her ownership after the policy was issued. Plaintiff argues she remains the "named insured" and there was no duty to notify defendant of a change in ownership.¹

An insurance policy is a contract, in which "the insurance company is the expert and unilaterally prepares the policy, whereas the insured 'is a layman unversed in insurance provisions and practices.'" Villa v. Short, 195 N.J. 15, 23 (2008) (quoting Gibson v. Callaghan, 158 N.J. 662, 669 (1999)). Therefore, the courts apply different rules to the interpretation of these contracts of adhesion and "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992)). However, "[i]f the policy terms are clear, courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased." President v. Jenkins, 180 N.J. 550, 562 (2004). See also Allstate Ins. Co. v. Meloni, 98 N.J. Super. 154, 160 (App. Div. 1967) (holding that when the wording of the question is clear, and in the absence of proof of fraud or unconscionable conduct on an insurance company, the insured are "chargeable with knowledge of the terms and contents of the policy and application."). As the Supreme Court observed, the language in an insurance policy "underscores the basic notion that the premium paid by the insured" and places limitations

¹ Under New Jersey law, the insured has the obligation to provide thorough and complete information on the insurance application. Great Am. Ins. Cos. v. Subranni, 336 B.R. 326 (D.N.J. 2007). This is "irrespective of the insurer's investigative efforts" because when asked questions in an insurance application, "the insured's obligation is to respond truthfully. First American Title Ins. Co. v. Lawson, 177 N.J. 125, 137 (2003).

that are "designed to restrict and shape coverage otherwise afforded." Ohio Cas. Ins. Co. v. Island Pool & Spa, Inc., 418 N.J. Super. 162, 169 (App. Div. 2011) (quoting Hardy v. Abdul-Matin, 198 N.J. 95, 102 (2009) (internal citations omitted)).

A. The applicable provisions in the insurance contract and underwriting guidelines

In New Jersey, "no policy or contract of fire insurance on any property" shall be issued without the required statements provided by the Legislature. N.J.S.A. 17:36-5.15. Required statements include "every such fire insurance policy shall contain a provision that its assignment shall not be valid except with the written consent of the insurer." N.J.S.A. 17:36-5.19. Pursuant to N.J.S.A. 17:36-5.20, added or changed provisions may occur only if "provided for in writing" but cannot be "inconsistent with the provisions of this policy."

The applicable terms in the dwelling policy state "[defendant] will provide the insurance in return for the premium and compliance with all applicable policy provisions." Prior to obtaining the policy, plaintiff had to acknowledge and confirm that her dwelling did not meet several conditions, including, "(20) property owned by a business or entity other than individual." If there is a change or waiver of the policy, Section (S) provides that "it must be in writing by [defendant] to be valid." Under Section (T) an "[a]ssignment of th[e] policy will not be valid unless [defendant] give[s] [their] written consent."

The policy also outlines situations in which coverage is denied, or the policy is cancelled. Coverage will not be provided to the named insured if, "whether before or after a loss" the individual has "(1) intentionally concealed or misrepresented any material fact or circumstance; (2) engaged in fraudulent conduct; or (3) made false statements relating to this insurance." Section (P), "Cancellation", describes that when a policy has been in effect for 60 days or more, defendant may cancel "if there has been a material representation of fact which if known . . . would have

caused [defendant] not to issue the policy or (2) if the risk has changed substantially since the policy was issued." If cancellation does occur, and the return premium is not refunded with the notice of cancellation, defendant will "refund it within a reasonable time after the date cancellation takes effect." The Underwriting Guidelines of 2017 (UG) provides the "agency does not have the authority to bind a risk that does not meet [the] Company's underwriting guideline and it is critical that . . . the agency strictly adhere to the binding authority/procedures outlined[.]" Within the UG, under "Ownership", a "[d]welling must be owned solely by individuals."

B. The provisions in the dwelling and underwriting guidelines provide ownership is material for the type of insurance plaintiff obtained

Plaintiff argues that when the defendant application was submitted, and the policy was issued, individuals owned the property. Plaintiff adds that because the policy does not prohibit a transfer of a property to a business entity, and the information used to rate the insurance premium was based upon the risk of a two-family dwelling, there is no material misrepresentation.

"A misrepresentation, made in connection with an insurance policy, is material if, when made, 'a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action.'" Palisades Safety & Ins. Ass'n Bastien, 175 N.J. 144, 148 (2003) (quoting Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 542 (1990) (alterations in original)). When the omission "naturally and reasonably influence[s] the judgment of the underwriting in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of the premium" the omission is material. First Am. Title Ins. Co. v. Lawson, 177 N.J. 125, 140 (2003) (quoting Lawson, 351 N.J. Super. at 420). In determining whether a false statement is material, "the focus is on the underwriter's view of the risk at the inception of the policy" and not materiality as it relates to the basis of the claim. Weinstein v. Mutual Ben. Life in Rehabilitation, 313 N.J. Super. 609, 614 (App. Div. 1998); see Massachusetts

Mut. Life Ins. Co. v. Manzo, 122 N.J. 104, 118 (1991) (explaining materiality relates to either the information relied upon in the insurer's decision to insure, or the terms of the contract).

Here, the plain language in defendant's insurance policy requires the insurer's consent in order for the insured to assign the policy to a third person, or in plaintiff's situation, entity. While there was no misrepresentation in plaintiff's initial application to defendant, her contractual representation was ongoing.² Here, plaintiff seeks coverage for the date the fire occurred and not for the date of her application. See Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co., 442 N.J. Super. 28, 36 (App. Div. 2015) (describing in occurrence policies, the peril insured is the occurrence itself, therefore once the occurrence takes place, coverage then attaches) (citing Zuckerman v. Nat'l Union Fire Ins. Co., 100 N.J. 304, 310 (1985)). Even if Defendant never evaluated the LLC for coverage, the material misrepresentation stems from the particular policy plaintiff obtained. Irrelevant is the fact that defendant provides insurance to business entities and trusts because it is undisputed plaintiff would not have been issued this particular policy had defendant known the property would be transferred to a business entity. In the plain language of the underwriting guidelines, it is forbidden. Further, the misrepresentation is not solely about plaintiff paying higher premiums, as defendant provided, the "policy at issue would not have been issued for any price." Accordingly, defendant provided an insurance policy that was inapplicable to plaintiff, which defendant noted was substantially less expensive than the policy plaintiff should have obtained.

II. Despite remaining the name insured, plaintiff no longer owned the insured property and needed consent to assign the policy before loss

² In the absence of a new application, renewal of a fire insurance policy is made on the assumption that the facts disclosed in the original application are true. Batka v. Liberty Mut. Fire Ins. Co., 704 F.2d 684, 687 (3d Cir. 1983). The general rule is that underwriters may, in making renewal decisions, rely on the contents of the original application. Ibid.

Plaintiff argues the "mere transfer of the [d]eed by [p]laintiff to a limited liability company is none of [d]efendant's concern and does not in any way effect [d]efendant's contractual obligation" to pay for the fire damage and loss of rents. Plaintiff adds that because she is the named insured, she does not need an assignment of the policy "she already owns merely because the deed was transferred to an LLC in which she has 50-percent interest after the policy was issued."

However, the precedent in New Jersey holds that "insurance is a contract of indemnity, personal to the party to whom it is issued" in which the insurer "undertakes to be responsible in case of loss, and cannot be transferred to a third person, so as to be valid in his hands against the insurer, without the insurer's consent." Kase v. Hartford Fire Ins. Co., 58 N.J.L. 34, 36 (Sup. Ct. 1895). Therefore, when the language in the policy requires consent, courts typically uphold the contractual clause and determine the policy is void, and not merely a breach of contract. Owen v. CNA Ins./Continental Cas. Co., 167 N.J. 450, 460-61 (2001). See AMB Prop., LP v. Penn Am. Ins. Co., 418 N.J. Super. 441, 455 (App. Div. 2011) (explaining "the purpose behind a no-assignment clause is to protect the insurer from having to provide coverage for a risk different from what the insurer had intended."). In New Jersey, the courts draw a distinction between an assignment before a loss which "involves a transfer of a contractual relationship while [an] assignment after [a] loss is the transfer of the right to a money claim." 3 Couch on Insurance § 35:8 (3d ed. 2016). Consequently, when the policy is transferred is significant:

Assignment of the right to collect or to enforce the right to proceed under a casualty or liability policy does not alter, in any meaningful way, the obligations the insurer accepted under the policy. The assignment only changes the identity of the entity enforcing the insurer's obligation to insure the same risk. Thus, the purpose behind the no-assignment clause is not inhibited by allowing claim, as opposed to policy, assignment.